92-1298

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
OFFICERS FOR JUSTICE, *et al.*,
UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit has brought about an unwarranted federal intrusion into the civil service examination processes of state and local governments that Title VII of the Civil Rights Act of 1964 and the Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. Part 1607, require public agencies to adopt race-conscious employment selection procedures on an *ad hoc* basis to supplant their own civil service rules and regulations governing appointment and promotion whenever a civil service examination has a disproportionately adverse impact upon minority candidates, regardless of the degree of validity and job-relatedness of the examination.

2. Whether, when expert testimony has established that a civil service examination is a valid predictor of job performance for both minority and nonminority candidates and that every possible step was taken in the development of the examination to minimize any disparate impact upon minority candidates, an employment selection procedure which permits the appointment of any candidate from a group of candidates whose examination scores fall within a certain range or "sliding band" using criteria that have not been shown to be predictors of successful job performance is an equally valid selection procedure as appointments in strict rank order of the test scores achieved by the candidates.

3. Whether the Civil Rights Act of 1991 is applicable to promotions made pursuant to an employment selection procedure approved by a federal district court prior to the Act but which were not actually made until after the date the Act became effective.

4. Whether Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, prohibits public agencies from adopting race-conscious employment selection procedures on an *ad hoc* basis after the administration of a civil service promotional examination for the

purpose of increasing the number of minority candidates likely to achieve promotion.

5. Whether the post-examination adoption of race-conscious employment selection procedures is permissible under a consent decree which not only makes no provision for racial quotas in hiring and promotion but also provides that the plaintiffs shall seek no further relief for the acts, practices or omissions alleged in their complaints save to enforce the provisions of the decree and, concomitantly, prohibits racial discrimination against all employees, minority and nonminority alike.

6. Whether a public agency's post-examination adoption of race-conscious employment selection procedures on an *ad hoc* basis for the purpose of increasing the number of minority candidates likely to achieve promotion violates the rights of nonminority candidates under the Equal Protection Clause of the Fourteenth Amendment.

PARTIES

Petitioner:

San Francisco Police Officers Association.

Respondents:

City and County of San Francisco, California; Civil Service Commission of the City and County of San Francisco; Officers For Justice; National Association For The Advancement Of Colored People (Western Region); League Of United Latin American Citizens; Chinese For Affirmative Action; National Organization For Women (N.O.W.); and United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner San Francisco Police Officers Association respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 5, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is certified for publication but is not yet officially or unofficially reported. It is reprinted in the Appendices to this Petition at pages 1a-14a. That opinion affirmed an unreported decision of the United States District Court for the Northern District of California that is reprinted in the Appendices to this Petition at pages 15a-47a. A prior unreported opinion of the district court disapproving a different *ad hoc* selection procedure is reprinted in the Appendices to this

Petition at pages 48a-59a. The consent decree involved in this proceeding was approved by the district court on March 30, 1979 in a decision reported at *Officers for Justice v. Civil Serv. Comm'n*, 473 F. Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983). The consent decree itself is set forth at 473 F. Supp. 809-826. A copy of the consent decree is also reprinted in the Appendices to this Petition at pages 60a-97a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000h-6, as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, and the Uniform Guidelines On Employee Selection Procedures, 29 C.F.R. Part 1607. The Fourteenth Amendment states in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title VII provides in pertinent part:

> § 2000e-2. Unlawful employment practices
>
> (a) It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2.

> § 2000e-5. Enforcement Provisions
>
> (g) . . . No order of the court shall require . . . the promotion of an individual as an employee who was refused . . . advancement . . . for any reason other than discrimination . . . .

42 U.S.C. § 2000e-5.

The Civil Rights Act of 1991, *supra*, Title I, Sec. 107(a), added subsection (m) to Section 703 of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2). This subsection states

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

§ 107(a), 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(m)).

Section 106 of the 1991 Act added 42 U.S.C. § 2000e-2(*l*) to Title VII. That section provides

> "Prohibition Against Discriminatory Use Of Test Scores"
>
> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, em-

ployment related tests on the basis of race, color, religion, sex, or national origin.

§ 106, 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(*l*).

Finally, Sec. 116 of the 1991 Act states

> Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

§ 116, 105 Stat. at 1071.

The Uniform Guidelines On Employee Selection Procedures, *supra*, provide in pertinent part:

> Sec. 1607.3. Discrimination Defined: Relationship Between Use of Selection Procedure and Discrimination
>
> A. *Procedure having adverse impact constitutes discrimination unless justified.* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of selection 6 below are satisfied.
>
> B. *Consideration of suitable alternative selection procedures.* Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. . . .

29 C.F.R. § 1607.3.

> Sec. 1607.5. General Standards For Validity Studies
>
> G. *Method of use of selection procedures.* The evidence of both the validity and utility of a selection procedure should support the method the user chooses

> for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. . . .

29 C.F.R. § 1607.5G.

STATEMENT OF THE CASE

This appeal arises from the second instance in which the City and County of San Francisco, California, has resorted to *ad hoc* revision of its selection procedures for appointment to the ranks of police sergeant and assistant inspector in order to promote a greater percentage of minorities than would have been appointed if appointments were made in strict rank order of the test scores achieved by the candidates on civil service examinations.

The City's promotional selection procedures are governed by a consent decree among all of the parties to this appeal. That decree was approved by the district court on March 30, 1979. It provides that

> [t]he City shall, subject to the availability of qualified minority and female applicants, adopt and seek to achieve an annual goal of selecting minorities and women for promotion to permanent Sergeant and Assistant Inspector positions in proportion to their representation in the qualified applicant pool for each examination.

Officers For Justice v. Civil Service Comm'n, *supra*, 473 F. Supp. at 815; Appendices, p. 73a. The consent decree provides further that the City may not use promo-

tional selection procedures that have an adverse impact on female and minority members of the San Francisco Police Department unless those procedures are valid under the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. part 1607 (*See Officers for Justice v. Civil Serv. Comm'n, supra*, 473 F. Supp. at 812; Appendices, p. 68a), but imposes no requirement that promotional preferences be granted to female and minority employees when necessary to meet promotional goals established in the consent decree for those employees. Instead, the consent decree specifically prohibits the City from unlawfully discriminating in any manner in hiring and promotions on the basis of sex, race, or national origin. *Id.*, at 811; Appendices, p. 66a.

In 1983, when the City first gave an examination under the consent decree for promotion to the ranks of police sergeant and assistant inspector, it announced before it administered the examination that the candidates would be promoted in rank order of their overall test scores, which were to be weighted sums of the scores they achieved on all three components of the examination. However, upon review of the results of the examination it was determined that female and minority candidates would be disproportionately excluded from promotions if the City made appointments on this basis. When an expert appointed by the district court advised that the examination could not be validated as a predictor of successful job performance if promotions were made in rank order of the composite test scores, the City's Civil Service Commission decided to adopt a new scoring procedure. Rather than appoint the candidates in rank order of composites of the scores they achieved on all three components of the examination, the Commission decided to grade the two written components of the examination on a pass-fail basis and to appoint the candidates in rank order of their scores on the oral component alone. This changed the scores received by the candidates in a manner that increased the number of minorities and reduced

the number of nonminorities with scores high enough to receive promotions. The district court upheld this change as a permissible affirmative action plan within the meaning of *United Steelworkers of America v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). In a series of three decisions, the Ninth Circuit reversed. *San Francisco Police Officers Ass'n v. City and County of San Francisco*, 812 F.2d 1125, 1126-1127 (9th Cir. 1987), *op. withdrawn, on reh'g*, 842 F.2d 1126 (1988), *amended*, 869 F.2d 1182 (1989), *cert. denied*, 493 U.S. 816, 110 S.Ct. 68, 107 L.Ed.2d 35 (1989).

In its original decision on review of the Commission's action, the Ninth Circuit stated that it was lawful for the Commission to develop an alternative selection procedure before attempting to validate the examination.

> Under the consent decree, which incorporates the Uniform Guidelines, the Commission could choose to revamp its selection procedures rather than seek to validate its initial weights. In fact, the validation process requires that the Commission explore such alternative procedures and use them if they have less adverse impact but are equally job-related. *See* 29 C.F.R. § 1607.3B (1986).

Id., at 1130, fn. 6. The Ninth Circuit concluded that the particular action which the Commission had taken was unlawful, however, because it permitted the Commission to manipulate the results of the examinations to produce desired racial and gender percentages.

> While we find that the Uniform Guidelines permit an employer to choose between validating a selection procedure or developing an alternative selection procedure without an adverse impact, we do not find that the Uniform Guidelines support the Commission's action in this case. The Uniform Guidelines recognize that an employer may take reasonable steps to assure that members of an underutilized protected group are included in the pool of applicants. [citation omitted]. For the reasons set forth below, however,

> we find that rescoring, rather than readministering the examinations, was unreasonable. The agencies that drafted the guidelines were warned against the use of illegal procedures under the guise of affirmative action. *See* 43 Fed. Reg. 38,290, 38,293 (1978). The agency response to these concerns was that illegal acts purporting to be affirmative action were not the goal of the guidelines and that employee selection procedures must be lawful. *Id.* The Commission's use of the alternative selection procedure was unlawful because it permitted the Commission to manipulate the results of the examinations to produce desired racial and gender percentages. Thus, the Commission's adjustment of scores became the sifting device, rather than the examinations themselves. Administering a new selection device would have achieved the consent decree goals without the appearance of unfairness that resulted from rescoring.

Id., at 1130, fn. 5.

The Ninth Circuit acknowledged that "[a]n affirmative action plan that is carefully contoured to accomplish the limited objective of reducing disparate impact on minority candidates does not unnecessarily trammel the rights of nonminority candidates" (*id.*, at 1131), but held that the Commission's action failed to meet this criterion for two reasons. These were,

> reweighing was an ad hoc attempt to achieve a result that the Commission's promotional examinations failed to produce. . . .

id., at 1132, and,

> Moreover, candidates for promotion should be on notice of how their performance will be evaluated in order to prepare themselves effectively for an examination. . . . A test that changes so dramatically after it is administered and the race and gender results are known is no test at all, but is a specious device used to produce whtaever result the Commission may choose to achieve.

Id. Accordingly, the Ninth Circuit concluded that the City's actions had violated the rights of nonminority employees under Title VII of the Civil Rights Act of 1964.

> [T]he Commission's decision to reweigh unlawfully restricted the promotional opportunities of nonminority candidates because the tests were scored to achieve a particular racial result. It trammeled the interests of nonminorities, in that the candidates were led to believe that the promotions would be based on merit alone. This harm to nonminorities was unnecessary because a less burdensome alternative, such as administering a new selection procedure, would have better achieved the goals of the consent decree without violating Title VII.

Id.

With regard to the remedy that would be appropriate for this violation, the Court indicated that a new examination could be given and that different candidates could be promoted based on the results of that new examination. *Id.*, at 1128-1129.

On rehearing, the Ninth Circuit concluded that the appeal was moot because the City had already made promotions on the basis of the revised scoring procedures and it would be inequitable to penalize the candidates who had been promoted by ousting them from their positions. *San Francisco Police Officers Ass'n v. City and County of San Francisco*, 842 F.2d 1126, 1128 (9th Cir. 1988), *amended*, 869 F.2d 1182, *cert. denied*, 493 U.S. 816, 110 S.Ct. 68, 107 L.Ed.2d 35 (1989).

In an amendment to its decision on rehearing, the Ninth Circuit returned to the conclusions from its original decision that the Commission had acted unlawfully and that the appeal was not moot. The Court also reiterated the conclusion from its decision on rehearing that it would be inequitable to penalize the candidates who had been promoted by ousting them from their positions. In this amended decision on rehearing, the Court did not address the issue of whether the Commission had

violated Title VII of the Civil Rights Act of 1964 but instead held that the City had violated the consent decree. According to the Court, all white males who took these examinations were victims of unlawful discrimination as the result of the Commission's action. *San Francisco Police Officers Ass'n v. City and County of San Francisco*, 869 F.2d 1182 (9th Cir. 1988), *cert. denied*, 493 U.S. 816, 110 S.Ct. 68, 107 L.Ed.2d 35 (1989).

> When, however, the City arbitrarily changed the weighting and promoted on the basis of this weighting, the City violated the Consent Decree by discriminating on the basis of race and sex. The victims of this discrimination were not the particular officers who had done well under the first weighting, as they had acquired no rights, but the larger group of all the white males who took the test and who were passed over by the discriminatory weighting and subsequent promotions.

Id., 869 F.2d at 1184. However, the Court also held that although the appeal was not moot, the white males who were the victims of the City's unlawful discrimination had received all of the relief to which they were entitled because the complaint filed by the Police Officers Association "did not seek back pay but the declaratory relief which is here given." *Id.*

The City refrained from administering further promotional examinations under the consent decree for the ranks of sergeant and assistant inspector until the Ninth Circuit's decision had become final and there was no further uncertainty over the issue of whether the candidates who had achieved promotions by reason of the 1983 examinations were to be ousted from their positions and would have to take new examinations. Accordingly, the next examinations for those ranks were not administered by the City until November and December of 1989, respectively.

Despite the best efforts of all parties to ensure that these examinations not only met all of the validity re-

quirements of the Uniform Guidelines but also utilized formats that would minimize the adverse impact upon minority candidates, these examinations also had a disproportionately adverse impact upon minorities.

Although the City contended that these examinations met all of the validity requirements of the Uniform Guidelines, because of the disparate impact of the examinations upon minority candidates the City again chose neither to demonstrate this to the district court nor to administer new examinations. Instead, as it did before, the City sought to reduce the disparate impact of the examinations by revising the selection procedure. In this instance, rather than changing or manipulating the scores of the candidates in a manner that would increase the scores of minority candidates and decrease the scores of nonminority candidates, the City requested on October 9, 1990, that the district court issue an order allowing it to reduce the adverse impact of the examinations upon minorities by simply appointing minority candidates with lower scores ahead of nonminority candidates with higher scores.

As justification for appointments of candidates in this manner, the City stated that two candidates whose scores are within a certain range or "sliding band" of scores must be considered to be equally qualified because it cannot be proved through statistical analysis techniques that the candidate with the lower score is less qualified than the candidate with the higher score. According to the City, appointment of the candidate with the lower score ahead of the candidate with the higher score is therefore not inconsistent with the principle that promotions are to be based upon the relative merit of the candidates as demonstrated by the results of the examination.

The "sliding band" selection procedure proposed by the City is based on the postulate that if an individual takes the same examination repeatedly, he or she will not achieve an identical score each time. Instead, the candidate will receive different scores within a certain predict-

able range or band of scores. This range or band of scores can be determined through the calculation of a number known as the "standard error of measurement," which is a function of the reliability and standard deviation of the particular examination. According to the City, all candidates whose scores fall within such a range or band of scores can be deemed to be equally qualified because the score of any candidate within the band could be higher or lower than the score of another candidate within the band if both candidates were to take the test over again.

At the outset of the "sliding band" selection process, the top of the band starts at the candidate who achieved the highest score on the examination. Under the City's theory, all candidates with scores no lower than the highest score in the band less the size of the "band" are deemed equally as qualified as the candidate with the highest score and may be appointed before the candidate with the highest score. In addition, because the "band" or range of scores is a constant number, appointment of the candidate with the highest score in the band causes the top of the "band" to slide downward to the candidate with the next highest score. In this fashion, candidates whose scores were previously below the bottom of the band may be brought into the band because the bottom of the band slides downward when the top of the band drops to the candidate with the next highest score. Although those candidates whose scores were initially below the bottom of the band could not previously be promoted ahead of the next highest scoring candidate now at the top of the band because they were not eligible for promotion until the band moved downward to include them, the downward movement of the band which caused them to be included in the band also caused them to be deemed equally as qualified as the candidate whose score is now at the top of the band. Accordingly, when the band slides downward, minority and nonminority candidates who were previously not eligible for promotion at

all become eligible for promotion ahead of the candidate whose score is now at the top of the band.

In *Bridgeport Guardians v. City of Bridgeport*, 933 F.2d 1140 (2d Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 33, 116 L.Ed.2d 277 (1991), the Second Circuit Court of Appeals held that the use of this "sliding band" selection procedure was appropriate under the facts of that case. The City of Bridgeport had failed to include components in its promotional examination that had been recommended by a consultant and, for that reason and others, it could not show that the results of the examination were reliable enough to justify appointments in rank order of the scores achieved by the candidates. "Banding" was thus an equally valid selection device in that case due to the fact that the examination itself was defective and the scores achieved by the candidates on the examination were therefore not sufficiently reliable predictors of job performance to justify rank order appointments. *Id.*, at p. 1148.

Under San Francisco's proposal of October 9, 1990, the City would make a total of 115 promotions to the rank of Q-50 Sergeant. The first 100 of those promotions would be made by rank order selection of the candidates with the 100 highest scores on the examination. The remaining 15 promotions would be made by selections from the 72 candidates within a band of scores beginning with the score of the candidate in position 101 on the list. Fourteen (14) of those candidates would be minority and one (1) nonminority. Twelve (12) would be male and three (3) female. Until no more minorities and females remained within the band, the race and sex of the candidates would be the exclusive factors used for selection.

The district court held a hearing on the City's "sliding band" proposal on November 6, 1990, at which it received expert testimony on the issue of whether that proposal was an equally valid alternative to appointment in rank order of the scores which the candidates achieved on the examination. Sheldon Zedeck, Ph.D., a Professor

of Psychology at the University of California at Berkeley and an expert in the field of psychometrics and test development and validation, testified that he had been retained by the City to oversee the development and administration of these examinations and that, unlike the circumstances presented in *Bridgeport Guardians v. City of Bridgeport*, *supra*, 933 F.2d 1140, every possible step had been taken by the City to ensure that these examinations were valid and job-related and to minimize the adverse impact upon minority candidates. Dr. Zedeck testified further that, in his opinion, these examinations were valid predictors of successful job performance and, because there was no reason to conclude that the accuracy of the examinations as predictors of successful job performance was any different for minority candidates than for nonminority candidates, they could properly be used for rank order appointments. Although Dr. Zedeck supported the City's "sliding band" proposal, he conceded that considerable research supports the assumption that over a large number of applicants, higher test scores will lead to higher job performance even if the test score difference between two applicants is small and statistically nonsignificant.

Ingram Olkin, Ph.D. a Professor in the Departments of Statistics and Education at Stanford University, testified that even though a candidate may not obtain the same score when he takes the same test a second time, a computation can be made of the statistical likelihood that a candidate who achieved a lower score than another candidate on the first administration of the test will achieve a higher score than the other candidate if both candidates took the test a second time. Using specific examples from the City's "sliding band" proposal, Dr. Olkin testified that this proposal would allow the selection of a candidate with a lower score than another candidate even though the chances were only 17 out of 100 that the candidate with the lower score would obtain a higher score than the other candidate if both candidates took the test a second time.

Dr. Olkin also testified that, in his opinion, the City's "sliding band" proposal was not a statistically appropriate procedure and misused the notion of a "confidence interval" in a way that leads to logical inconsistencies and misinterpretations. In this regard, Dr. Olkin stated that the City was inappropriately applying statistical procedures used to reject the hypothesis that two things are equal in order to prove that hypothesis.

Lawrence S. Meyers, a Professor of Psychology at California State University, Sacramento, testified that any departure from selections in rank order of the scores achieved by the candidates would probably result in the selection of a less qualified group. Dr. Meyers also testified that he had performed a statistical analysis which demonstrated that if the City were to make appointments from within the band of candidates for the rank of Sergeant in accordance with its original "sliding band" proposal, the chances were less than one in ten thousand that the persons so appointed would be equally as qualified as a group as the persons who would be appointed through rank order selection.

The testimony thus established without contradiction that although there may be a reasonable probability that an individual candidate who achieved a lower score on an examination than another candidate will achieve a higher score than that other candidate if both take the examination a second time, the chances were extremely small that the group of persons who would be appointed under the City's "sliding band" proposal were equally as qualified as the group of persons who would be appointed through rank order selection. Rather, the best qualified group of candidates was more likely to be appointed through rank order selection. The testimony also established that even though it cannot be proved statistically that the best qualified group of candidates will *always* be appointed through rank order selection, the chances of this not being true are so small that it would be clearly be error to deem that the candidates who would be appointed under "band-

ing" will be equally as qualified as those appointed through rank order selection.

On June 6, 1991, the district court issued an order that promotions pursuant to this particular "sliding band" proposal would be unlawful. The text of that order is set forth in the Appendix at pages 48a-59a. The district court declined to decide the question of whether the "sliding band" selection procedure is psychometrically sound or valid under Title VII and the consent decree. Instead, after noting that the City's approach involved a novel twist in that the "sliding band" would never actually slide, the district court ruled that the City's proposal was impermissible under the Equal Protection Clause of the Fourteenth Amendment because race was the sole criterion for selection of the candidates to be appointed from within the band. Appendices, pp. 53a-58a. After noting that race may be used as a positive factor in selections for promotion but only in conjunction with other appropriate criteria, the district court suggested that the City submit a different proposal for its review. Appendices, p. 58a.

The City submitted such a revised proposal to the district court on June 28, 1991. Under this revised proposal, race or gender would not be a sole criterion for selections from within a band of candidates. Instead, such selections would be based upon four criteria, one of which was the Police Department's affirmative action goals under the consent decree.

On August 21, 1991, the district court issued an order adopting the City's revised proposal with modifications. The text of that order is set forth in the Appendices at pp. 15a-47a. The criteria to be used for selections from within the band under the district court's order were as follows:

1) Professional conduct, including good conduct, the absence of disciplinary actions, and the absence of sustained citizen complaints;

2) Job-related performance and achievement;

3) Job-related education, training, experience and career development; and

4) The Department's affirmative action goals. Appendices, p. 46a.

The district court concluded that the "sliding band" selection procedure was of equal or greater validity than appointments in rank order of the examination scores (Appendices, p. 31a) and, because race and sex were only positive factors rather than sole criteria for selections from within the band, the City's revised "banding" proposal was "lawful under the Consent Decree entered in this action, Title VII and the Equal Protection Clause of the Fourteenth Amendment." Appendices, pp. 33a-34a. Under these circumstances, according to the district court, the Uniform Guidelines require that the City adopt such an alternative. Appendices, p. 30a.

After the Ninth Circuit denied a request by petitioner for a stay of promotions to the ranks of sergeant and assistant inspector pending appeal of the district court's decision, the City proceeded to appoint the first 100 candidates on the civil service list of eligibles for the rank of sergeant solely on the basis of their test scores and 15 other candidates from a group of the next 72 candidates on the basis of the four criteria established by the district court.

In a decision filed on November 5, 1992, the Ninth Circuit affirmed the district court's order of August 21, 1991, in its entirety. Appendices, pp. 1a-14a.

Most of the candidates in positions 101 through 115 on the civil service list of eligibles who would have received promotions if the City had made all 115 appointments to the rank of sergeant solely on the basis of test scores did not and will not receive promotions as a result of the district court order approving the "sliding band" selection procedure unless this Court reverses the decision of

the Ninth Circuit and holds that these candidates have been the victims of unlawful discrimination.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

Review of the decision rendered by the Ninth Circuit is appropriate for the reason that the Ninth Circuit has decided important questions of federal law which have not been, but should be, settled by this Court.

The Ninth Circuit's decision holds in effect that Title VII of the Civil Rights Act of 1964 requires the City and County of San Francisco to adopt race-conscious selection procedures for promotion in its police department on an *ad hoc* basis whenever a promotional civil service examination has a disproportionately adverse impact upon minority candidates, regardless of the degree of validity and job-relatedness of the examination.

By holding that San Francisco acted within the law when it adopted an *ad hoc* selection procedure that included both a substantial expansion of the number of candidates eligible for selection and the use of promotional criteria developed only after the results of an examination had become known, the Ninth Circuit has wrongly transformed Title VII into a vehicle for the wholesale destruction of traditional civil service protections against favoritism, patronage, and nepotism.

This result thwarts the clearly declared congressional purpose embodied in the Civil Rights Act of 1991 to prohibit the manipulation of examination results as a means for achieving racial quotas in hiring and promotion.

Of equal or greater consequence is the Ninth Circuit's conclusion that San Francisco's post-examination adoption of race-conscious selection procedures is permissible under a consent decree which (1) makes no provision for racial quotas in hiring and promotion, (2) provides

that the plaintiffs shall seek no further relief for the acts, practices or omissions alleged in their complaints save to enforce the provisions of the decree and, (3) prohibits racial discrimination against all members of the City's police department, minority and nonminority alike.

The Ninth Circuit's decision completely eviscerates petitioner's right under the consent decree to a discrimination-free workplace. This decision also presents a threat to other, similarly situated public agencies and labor organizations throughout the nation that have entered into similar consent decrees. One of the primary objectives of such decrees is to maximize the promotional opportunities of all employees by assuring frequent and regular promotional examinations without the delay caused by continual litigation over the validity of those examinations. This objective obviously cannot be achieved under the holding of the Ninth Circuit that where, as here, whenever a civil service examination has a disproportionately adverse impact upon minority employees, a public agency must first adopt an *ad hoc* selection procedure to remedy the disparate impact and then obtain a ruling from the district court approving the specific procedure which it chose. Hence, if the Ninth Circuit's decision is allowed to stand, the result will be that other, similarly situated public agencies and labor organizations which entered into consent decrees to avoid the disruption caused by continual litigation over the agency's promotional selection procedures are deprived of the benefit of the bargain they believed they had made. Moreover, public agencies will have little incentive to enter into settlements of employment discrimination lawsuits over their hiring and promotional selection procedures when faced with the prospect that those settlements will not actually put an end to the litigation. Accordingly, another result of the Ninth Circuit's decision will be to vitiate the strong public policy encouraging the settlement of employment discrimination litigation.

The importance of the issues decided by the Ninth Circuit and the impact its decision is likely to have on

the employment practices of other, similarly situated public agencies and labor organizations are thus clearly sufficient to warrant review by this Court.

II. THE NINTH CIRCUIT HAS CONSTRUED TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE UNIFORM GUIDELINES ON EMPLOYMENT SELECTION IN A MANNER THAT PRODUCES AN UNWARRANTED FEDERAL INTRUSION INTO THE CIVIL SERVICE EXAMINATION PROCESSES OF STATE AND LOCAL GOVERNMENTS.

One of the declared purposes of the Uniform Guidelines On Employee Selection Procedures is to preserve merit-based selection principles while eliminating discrimination on the basis of race, color, sex, religion, or national origin.

> The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin.

29 C.F.R. § 1607.17(4).

In acordance with these purposes, the Guidelines provide that when an employment selection procedure has produced an adverse impact upon minority candidates, an employer may supplant that selection procedure with another if the replacement selection procedure is of equal validity. 29 C.F.R. § 1607.3(B).

The term "validity" is used to denote the degree to which a selection procedure is representative of important aspects of performance on the job and predictive of successful job performance. 29 C.F.R. § 1607.16(D)-(F).

The examinations at issue on this appeal were indisputably valid predictors of successful job performance.

However, the district court's order of August 21, 1991, provided that once 100 promotions had been made to the rank of sergeant in rank order of the test scores achieved by the candidates, 15 additional appointments were to be made from a group of the next 72 candidates using four criteria which had not been shown by any evidence to be predictive of successful job performance. These criteria, which had not been validated, became the sifting device rather than the validated examination. Because these criteria had not been validated, it was clear error for the district court to conclude that the use of these criteria for promotional selection was an equally valid alternative to appointment in rank order of the test scores achieved by the candidates.

It was also clear error for the district court to conclude that an equally qualified group of candidates would be promoted through the "sliding band" procedure as through appointment in rank order of the test scores achieved by the candidates. The evidence presented to the district court demonstrated that although there may be a reasonable likelihood when comparing individual candidates that the candidate with a lower test score than another candidate on the first administration of an examination may achieve the higher test score on a second administration, there was virtually no likelihood that a group of 15 candidates with a lower average test score than another group of 15 candidates on the first administration of an examination would achieve a higher average test score on a second administration. Hence, a group of candidates appointed through the "sliding band" procedure will almost always be less qualified than a group of candidates appointed in rank order of the test scores.

Thus, by affirming the district court's order of August 21, 1991, the Ninth Circuit has supplanted the merit-based civil service rules and regulations of the City and County of San Francisco with an employment selection procedure based on factors other than merit that is likely

to result in the appointment of a less qualified group of candidates to the rank of police sergeant.

The introduction by the district court of factors other than merit as selection criteria for promotion further compromises the City's civil service rules and regulations by introducing the possibility of promotions based on favoritism, patronage, and nepotism. Under these criteria, candidates will have an advantage in consideration for promotion who have received assignments to special committees within the police department or otherwise have been granted training, experience and career development that was not provided to all candidates on an equal basis. Accordingly, except for the unlikely case where there is no possibility of favoritism, patronage or nepotism as a factor in such assignments, the "sliding band" procedure approved by the district court subverts the civil service prohibition of favoritism, patronage and nepotism as factors in promotional selection.

The district court and the Ninth Circuit have both concluded that when a civil service examination has a disproportionately adverse impact upon minority candidates, Title VII and the Uniform Guidelines do not merely permit but rather command the City to supplant its civil service rules and regulations with *ad hoc* race-conscious selection procedures that reduce or eliminate such adverse impact. As shown above, this conclusion transforms Title VII and the Uniform Guidelines into a vehicle for the wholesale destruction both of civil service principles that promotions are to be based on the relative merit of the candidates and of civil service protections against favoritism, patronage and nepotism. Because the decision of the Ninth Circuit will affect employee selection procedures in other public agencies as well as the City and County of San Francisco, the issue of whether this decision produces an unwarranted federal intrusion into the civil service examination processes of state and local governments is clearly of sufficient importance to warrant review by this Court.

III. THE FACTS PRESENTED IN THIS ACTION PROVIDE THE COURT WITH A UNIQUE OPPORTUNITY TO CLARIFY THE PRINCIPLES GOVERNING RETROACTIVE APPLICATION OF THE CIVIL RIGHTS ACT OF 1991 AND OTHER FEDERAL STATUTES.

Review is also warranted because this case presents the Court with a unique opportunity to clarify the principles governing retroactive application of the Civil Rights Act of 1991 and other federal statutes.

Section 402(a) of the 1991 Act states that the Act takes effect on the date of its enactment. 105 Stat. 1099. The Act received final congressional approval on November 7, 1991, which was about two and one-half months after the district court's order of August 21, 1991, approving the "sliding band" selection procedure but before the City actually made any promotions using that procedure.

The Court noted in *Bradley v. School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), that retroactive application is not given to changes in the law when such retroactive application would "infringe upon or deprive a person of a right that had matured or become unconditional" and thereby result in manifest injustice. *Id.*, at 716-720. Some circuit courts of appeal have concluded that the 1991 Act should not be applied to cases that were pending at the time of its enactment. *See, e.g., Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), *pet. for cert. filed* 61 U.S.L.W. 3371 (U.S. Oct. 28, 1992) (No. 92-757); *Johnson v. Uncle Ben's*, 965 F.2d 1363 (5th Cir. 1992), *pet. for cert. filed* 61 U.S.L.W. 3356 (U.S. Sept. 29, 1992) (No. 92-737); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *contra, Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), *pet. reh. and reh. en banc pending.* However, in cases where no matured or unconditional rights are involved, retroactivity will not create a manifest injustice and is therefore proper and appropriate.

Bradley v. School Board, *supra*, 416 U.S. at 720. Because the City had not yet made any promotions pursuant to its "sliding band" proposal at the time of enactment of the 1991 Act, no person had obtained a right to a promotion at the time the Act was enacted that had become matured or unconditional. The principles underlying retroactivity thus compel the conclusion that the Act should be applicable to the City's modified "banding" proposal notwithstanding the fact that this case was pending at the time of its enactment, even though the Act may not be applicable to other pending cases.

IV. THE NINTH CIRCUIT HAS CONSTRUED THE CIVIL RIGHTS ACT OF 1991 IN A MANNER THAT THWARTS THE CLEARLY DECLARED CONGRESSIONAL PURPOSE OF PROHIBITING THE MANIPULATION OF CIVIL SERVICE EXAMINATION RESULTS TO ACHIEVE RACIAL QUOTAS IN HIRING AND PROMOTION.

The Court should also grant review because the Ninth Circuit has construed the Civil Rights Act of 1991 in a manner that thwarts the clearly declared congressional purpose of prohibiting the manipulation of civil service examination results as a means for achieving racial quotas in hiring and promotion.

Section 107 of the Civil Rights Act of 1991, *supra*, clarifies Section 703 of Title VII of the Civil Rights Act of 1964 by the addition of subsection (m) to Section 703 (42 U.S.C. 2000e-2). This new subsection states

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. 2000e-2(m).

On October 30, 1991, Senator Dole requested and received the unanimous consent of the Senate to insert into

the Congressional Record a second-by-section analysis of the Act representing the views of the administration, himself, and Senators Burns, Cochran, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour and Thurmond. That section-by-section analysis states that this new subsection (m) is applicable not only to employment practices which discriminate against minorities but also to affirmative action plans which grant preferences to minorities:

> It should also be stressed that this provision is equally applicable to cases involving challenges to unlawful affirmative plans, quotas, and other preferences.

137 Cong. Rec. S 15476 (October 30, 1991).

The "sliding band" procedure approved by the district court uses race as a motivating factor in selections for promotion. This proposal is therefore clearly unlawful under section 107 of the 1991 Act unless it is excepted from the general rule declared therein by the introductory phrase "[e]xcept as otherwise provided in this title" and the "savings clause" set forth in section 116 of the 1991 Act. Section 116 states

> Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

105 Stat. 1079.

The section-by-section analysis submitted by Senator Dole declares that this section does not resolve the question of the legality under Title VII of affirmative action programs that grant preferential treatment to some on the basis of race, color, religion, sex or national origin, and thus "tend to deprive" other "individuals of employment opportunities . . . on the basis of race, color, religion, sex, or national origin." 137 Cong. Rec. S 15477-15478 (October 30, 1991). It cannot reasonably be concluded, however, that Congress intended by section 116

to preserve the lawfulness of all affirmative action plans that were lawful prior to adoption of the Act. Section 106 of the Act (now 42 U.S.C. § 2000e-2(*l*)), entitled "Prohibition Against Discriminatory Use Of Test Scores," provides:

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to *adjust the scores of, use different cutoff scores for, or otherwise alter the results of*, employment related tests on the basis of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(*l*) (emphasis added). The Act does not give examples of methods or practices of test score manipulation which are prohibited by section 106. However, the legislative history of the Act clearly demonstrates that Congress' primary motivation for the adoption of this section was to prohibit any further use of a practice known as "within-group norming" or "race-norming." According to House Report No. 102-40(II), "race-norming" was an affirmative action plan being used by 34 states and a number of private employers at the time the 1991 Act was adopted, with encouragement from the United States Department of Labor. H.R. Rep. No. 102-40(II), 102nd Cong., 1st Sess. 64, *reprinted in* 1991 U.S. Code Cong. & Admin. News 694, 749-750. The section-by-section analysis submitted by Senator Dole declares that

> Section [106] means exactly what it says: race-norming or any other discriminatory adjustment of scores or cutoff points of any employment related test is illegal. This means, for instance, that discriminatory use of the Generalized Aptitude Test Battery (GATB) by the Department of Labor's [sic] and state employment agencies' [sic] is illegal. It also means that race-norming may not be ordered by a court as part of the remedy in *any* case, nor may it be approved by a court as a part of a consent decree, when done because of the disparate impact of those

> test scores. *Seen* [sic] *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140 (2d Cir. 1991).

137 Cong. Rec. S15476 (October 30, 1991).

Section 106 of the 1991 Act thus expressly made unlawful an affirmative atcion plan that was being used by 34 states and a number of private sector employers, with encouragement from the United States Department of Labor, at the time the 1991 Act was adopted. Accordingly, to construe the phrase "in accordance with the law" in section 116 as preserving the lawfulness of all affirmative action plans that were lawful prior to adoption of the Act would bring sections 106 and 116 of the Act into irreconcilable conflict. In cases of seeming conflict in the provisions of a statute, a construction which would permit both provisions to stand should be employed whenever possible. *Korte v. United States*, 260 F.2d 633, 636 (9th Cir. 1958), *cert. denied*, 358 U.S. 928, 79 S.Ct. 313, 3 L.Ed.2d 301 (1959). Section 116 must therefore be interpreted as prohibiting any further manipulation of the results of employment selection devices as a means for achieving racial quotas in hiring and promotion.

This construction of the Act is also supported by the reference to *Bridgeport Guardians, Inc. v. City of Bridgeport, supra*, 933 F.2d 1140, in the section-by-section analysis of the Act inserted into the record by Senator Dole. That reference was clearly intended to express disapproval of "banding." Had the intent of this analysis been otherwise, it would have cited the district court decision in that case, which rejected "race-norming" in favor of banding (*Bridgeport Guardians, Inc. v. City of Bridgeport*, 735 F. Supp. 1126, 1137 (D. Conn. 1990), *aff'd*, 933 F.2d 1140 (5th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 337, 116 L.Ed.2d 277 (1991)), rather than the decision of the court of appeals, which made no reference to "race-norming."

V. THE NINTH CIRCUIT HAS INTERPRETED THE CONSENT DECREE BETWEEN THE PARTIES IN A MANNER THAT THREATENS THE STABILITY OF SUCH AGREEMENTS AND FRUSTRATES THE CONGRESSIONAL OBJECTIVE OF SETTLEMENT OF EMPLOYMENT DISCRIMINATION LITIGATION THROUGH AGREEMENT BETWEEN THE PARTIES.

As noted above, the Ninth Circuit's decision completely eviscerates petitioner's right under the consent decree to a discrimination-free workplace and presents other, similarly situated public agencies and labor organizations having similar consent decrees with the threat of unending litigation over employment selection procedures that were intended to be protected from further challenge by those decrees. This decision also will leave public agencies with little incentive to enter into settlements of employment discrimination lawsuits over their hiring and promotional selection procedures, since they will be faced with the prospect that those settlements will not actually put an end to the litigation. Other courts have concluded that nonminority employees have enforceable rights under similar consent decrees to validated, job-related, nondiscriminatory promotional selection procedures. *See Afro-American Patrolmen's League v. City of Atlanta*, 817 F.2d 719, 723-724 (11th Cir. 1987) (city violated consent decree by abandoning police promotional procedure for which the passage rate of minority employees was less than 80% of that of whites without making an attempt to determine whether the promotional procedure was valid and job-related); *Wilmington Firefighters v. City of Wilmington*, 632 F. Supp. 1177 (D. Del. 1986) (city violated consent decree by altering promotional testing procedures for the sole purpose of increasing the number of minorities achieving promotion). Review by this Court is thus appropriate to resolve this conflict of decision as well as for the other reasons set forth above.

VI. THE NINTH CIRCUIT HAS DECIDED THIS APPEAL IN A MANNER INCONSISTENT WITH THE EQUAL PROTECTION PRINCIPLES ESTABLISHED BY THE DECISIONS OF THIS COURT.

Finally, review is appropriate because the Ninth Circuit has decided this appeal in a manner inconsistent with the equal protection principles established by the decisions of this court.

Although the courts have permitted employers to use race as a factor in selections among qualified applicants pursuant to an affirmative action plan that is "narrowly tailored" to remedy a "manifest imbalance" in "traditionally segregated" job categories or to otherwise remedy past discrimination (*See, e.g., City of Richmond v. Croson*, 488 U.S. 469, 493-496 (plurality opinion) and 520 (Scalia, J., concurring in the judgment), 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Higgens v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989)), such relief can be approved only after it has been demonstrated that race-neutral means have been "carefully examined and rejected" and that the beneficiaries of such race-based preferences have "suffered from the effects of past discrimination." *Croson, supra*, 488 U.S. at 507-508.

The consent decree between the parties to this action declares that it constituted the complete remedy for unlawful discrimination that occurred prior to the date of that agreement. Hence, the "sliding band" selection procedure approved by the district court's order of August 21, 1991, cannot be deemed as a remedy for past discrimination. Its only purpose was to correct a racial imbalance in the promotional ranks of the City's police department. The use of race-conscious relief for that purpose is not permitted under the Equal Protection Clause. *See Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 480-481, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986). Accordingly, the district court's order of August

21, 1991, operated to deprive nonminority employees of their constitutional equal protection rights.

CONCLUSION

For all of the reasons set forth above, the writ of certiorari should be granted and the judgment entered by the Ninth Circuit Court of Appeals should be reversed with directions for entry of a different judgment in favor of petitioner.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-16519

D.C. No. CV-73-00657-RFP

OFFICERS FOR JUSTICE, et al.; UNITED STATES OF AMERICA,
Plaintiffs,

and

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,
Intervenor-Appellant,

v.

THE CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, et al.; CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, District Judge, Presiding

Argued and Submitted
July 13, 1992—San Francisco, California

Filed November 5, 1992

Before: J. Clifford Wallace, Chief Judge, Cecil F. Poole, Circuit Judge, and Malcolm F. Marsh,* District Judge

Opinion by Chief Judge Wallace

Duane W. Reno, Davis, Reno & Courtney, San Francisco, California, for the intervenor-appellant.

George A. Riley, Special Assistant to the City Attorney; California (Civil Service Commission); Laura J. Schulkind, Public Advocates, Inc., San Francisco, California (Officers for Justice), for the defendant-appellees.

OPINION

WALLACE, Chief Judge:

The San Francisco Police Officers' Association (Union) appeals from a district court order approving the City and County of San Francisco's (City) proposal to "band" scores from the 1989 promotion examinations for police sergeant and assistant inspector. The Union challenges this scoring procedure on the grounds that it employs racial preferences in violation of (1) Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2000h-6, as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991 Act), (2) the equal protection clause of the Fourteenth Amendment, and (3) the consent decree entered earlier in this action. The Union also contends that banding is not a "substantially equally valid" alternative to rank order promotions under the *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 (1990) (*Uniform Guidelines*). The district court had jurisdiction pursuant to 42 U.S.C. §§ 2000e, 1981, 1983. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1). We affirm.

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* Honorable Malcolm F. Marsh, United States District Judge, District of Oregon, sitting by designation.

I

This appeal arises out of the district court's August 21, 1991, order declaring "banding" a legally valid scoring procedure for promotion examinations to certain ranks in the San Francisco Police Department (Department). The order permits the City to treat scores that fall within a statistically derived "band" as substantively equivalent for purpose of the knowledge, skills, and abilities measured by the examination. The City proposes to use banding in connection with the last 15 of 115 appointments in order to promote a higher percentage of minority officers to sergeant and assistant inspector positions than would be promoted under a strict rank order system.

The City seeks to band some test scores as a means of complying with the consent decree entered earlier in this action. The consent decree settled two race and sex discrimination actions brought by the Officers for Justice and the United States pursuant to 42 U.S.C. §§ 1981 and 1983, and Title VII. The Union intervened as a defendant in both of these actions. All parties later entered into the consent decree, which the district court approved in March 1979. *See Officers for Justice v. Civil Serv. Comm'n*, 473 F. Supp. 801 (N.D. Cal. 1979) (*Officers for Justice*), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983).

The consent decree, which is based upon an undisputed history of discrimination, prohibits the City from unlawfully discriminating against any employee or applicant for employment with the Department on the basis of race, sex, or national origin. *Id.* at 811. It also provides for "specific, definable and good faith efforts to be made [by the City] to achieve certain goals for employment of women and minorities" within a specified time period. *Id.* at 810. It establishes as a target the appointment of minorities and women to sergeant and assistant inspector positions in proportion to their representation in the

qualified applicant pool and sets a long term goal of 45 percent minority representation in the Department. *Id.* at 813-15. In addition, the consent decree prohibits the use of selection procedures that have an adverse impact on minorities and women unless they are proven to be valid under the *Uniform Guidelines. Id.* at 812.

This is not the first time we have examined the Department's promotion procedures. *See San Francisco Police Officers' Ass'n v. City and County of San Francisco*, 812 F.2d 1125, 1132 (9th Cir. 1988), *op. withdrawn, on reh'g*, 842 F.2d 1126, 1128 (9th Cir. 1988), *amended*, 869 F.2d 1182 (9th Cir. 1988) (*Police Officers' III*), *cert. denied*, 493 U.S. 816 (1989). In *Police Officers' III*, we disapproved of a scoring system that changed the relative weight of different components of an examination as a means of minimizing its adverse impact on minorities. We held that result-oriented reweighting of examination results unlawfully discriminated against candidates on the basis of race and gender. 869 F.2d at 1184. We decided, however, not to penalize those individuals who had been promoted under the reweighting plan. *Id.*

On remand, the district court ordered the City to administer new examinations and to appoint 100 sergeants and 60 assistant inspectors on the basis of the results. The examinations were administered in November and December 1989. Despite the City's efforts to administer a fair examination, which included the hiring of outside professional test developers, the 1989 examinations again produced an adverse impact on minorities.

Rather than discard the examination results, or administer a new examination, the City proposed to "band" the scores in an effort to meet the requirements of the consent decree. The "band" is a statistically derived confidence range that is applied to the examination results. Differences between scores within the band are considered

to be statistically insignificant due to measurement error inherent in scoring the examination. The City proposed to treat scores within the band as identical for purposes of determining promotion eligibility. For those within the same band, the City could then consider secondary criteria, not measured by the examination, in selecting candidates for promotion. When the top scorer within a band is selected for promotion, the band would "slide" down and the next highest score would serve as the reference point. In this way, no candidate would be denied a promotion in favor of another whose score is statistically significantly lower than his or hers.

Banding is premised on the belief that minor differences in test scores do not reliably predict differences in job performance. It also recognizes that an individual is unlikely to achieve an identical score on consecutive administrations of the same examination. Because some measurement error is inevitable, strict rank order promotions will not necessarily reflect the correct comparative abilities of the candidates. The smaller the difference between observed scores, the more likely it is a result of measurement error, and not a variance in job-related skills and abilities.

Through the application of a statistical measurement of reliability, the City determined the width of the bands to be applied to the examination results in this case. The City computed the standard error of measurement by multiplying the standard deviation of scores from the examination by the square root of one minus the reliability coefficient. The City's application of two standard deviations established a confidence factor of 1.96 which, when multiplied by the standard error of measurement, produced a band of 4.0 points for the sergeant's examination and 5.48 points for the assistant inspector's examination. The sergeant band encompassed 52 of 747 candidates, the assistant inspector's 71 of 831,

The City then sought a declaratory judgment from the district court that its banding proposal was legal. The City proposed to make the 100 promotions ordered by the district court in strict rank order and 15 additional promotions pursuant to its banding proposal. The City also indicated that it would use race as the sole criterion for promoting candidates whose scores were within the same band. Minority candidates would be selected first from within each band. When no minorities remained, the highest scorers would be selected until the band "slid" down to encompass additional minority candidates. Race would thus be the paramount consideration in the selection of candidates from within the band.

The district court heard two and one-half days of testimony from five experts on the validity of banding as a selection method. The court ruled that the City's plan violated the restrictions on race conscious remedies set forth by the Supreme Court in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), and by this court in *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987) (*Higgins*), *cert. denied*, 489 U.S. 1051 (1989). The district court indicated, however, that banding was an appropriate use of test scores and that the City's computation of the band was acceptable. The court also suggested that a modified proposal, along the lines approved in *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140 (2d Cir.), *cert. denied*, 112 S. Ct. 337 (1991), would be considered. The City then proposed three criteria in addition to race—professional conduct, education, and training and experience—to be used in selecting candidates for promotion from within the band. The district court accepted this modificaiton and declared banding and the proposed selection criteria "legally sound."

II

We first consider whether the use of racial preferences as a "plus" factor in promotion decisions violates Title VII as amended by the 1991 Act, the equal protection

clause, and the consent decree. Whether the City's "banding" proposal comports with Title VII and equal protection are questions of law subject to de novo review, *Bouman v. Block*, 940 F.2d 1211, 1220-21 (9th Cir.), *cert. denied*, 112 S. Ct. 640 (1991), as is the district court's holding that the banding proposal is lawful under the consent decree. *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 893 (9th Cir. 1982). The burden lies with the Union to show that the City's voluntary affirmative action plan is unconstitutional or impermissible under Title VII. *See Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 626 (1987) (*Johnson*); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 277-78 (1986) (*Wygant*).

A.

Title VII proscribes employer discrimination against any individual on the basis of race with respect to the terms and conditions of employment. 42 U.S.C. § 2000e-2(a). This proscription, however, does not bar the use of race conscious affirmative action programs when certain criteria are met. *Johnson*, 480 U.S. at 628-30. Under Title VII analysis, "voluntary adoption of a race-based remedy may be justified by a showing that a 'manifest imbalance' exists, reflecting underrepresentation of women and minorities in 'traditionally segregated job categories.'" *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1448 (9th Cir. 1989) (*Davis*), *citing Johnson*, 480 U.S. at 631; *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

The Union does not challenge the propriety of the affirmative action program under traditional Title VII analysis. Instead, it argues that section 107(a) of the 1991 Act, amending Title VII, prohibits the consideration of race as a factor in any employment decision. Because the 1991 Act was passed after the district court's ruling in this case, the question arises whether the 1991 Act

applies retroactively. It is unnecessary to reach this issue, however, because the Union's argument on the merits is incorrect.

Section 107(a) of the 1991 Act provides that:

> *Except as otherwise provided in this title*, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

§ 107(a), 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(m)) (emphasis added). The City asserts, and the Union does not dispute, that the savings clause of section 107 encompasses section 116 of the 1991 Act. Section 116 provides that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." § 116, 105 Stat. at 1071. The Union argues that the phrase "in accordance with law" refers to the law as amended by the 1991 Act and that because section 107 prohibits the use of race as a motivating factor, "even though other factors also motivated the practice," the race conscious promotions at issue in this case are not "in accordance with law."

The Union's reading of the 1991 Act is predicated on an internal inconsistency: that Congress sought to protect affirmative action in section 116 while outlawing it in section 107. Such an interpretation should be "avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). The City properly argues that a more natural reading of the phrase "in accordance with law" is that affirmative action programs that were in accordance with law *prior* to passage of the 1991 Act are unaffected by the amendments. The lan-

guage of the statute is clear, and the City's interpretation is consistent with that language.

In addition, the 1991 Act responded to several Supreme Court Title VII decisions, none of which addressed the question of affirmative action. In reversing the result of those decisions, Congress did not state that it also sought to overturn affirmative action. "[A]bsent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction." *Johnson v. First Nat'l Bank*, 719 F.2d 270, 277 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). Therefore, we conclude that the 1991 Act does not alter existing affirmative action case law.

In its reply brief, the Union argues that banding is prohibited by section 106 of the 1991 Act, which provides that it is unlawful "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." § 106, 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000-2(1). The Union also argues that the Civil Rights Act of 1964 prohibits banding because it unnecessarily trammels the interests of nonminorities. The Union did not raise or discuss either of these issues in its opening brief. "[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief." *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). Because the Union has waived these issues, we will not address them.

B.

The Union next argues that the City's banding proposal violates the equal protection clause of the Fourteenth Amendment. It contends that the effect of past discrimination and the present racial imbalance in the Department are addressed in the consent decree and therefore

cannot serve as reasons for considering race in promotion decisions. It also contends that the mere imbalance in the results of the 1989 examination does not justify use of race as a factor without an affirmative showing that the examination actually discriminated against minorities. Because the City did not attempt to make this showing, the Union asserts that the City's use of race as a "plus" factor violates equal protection.

Public employers are permitted to use race as a factor in selecting between qualified applicants pursuant to a "narrowly tailored" affirmative action plan designed to remedy past unlawful discrimination. *United States v. Paradise*, 480 U.S. 149, 167 (1987) (*Paradise*) (compelling state interest "unquestionably" exists where a race conscious employment program remedies past and present discrimination by a state actor). Under the strict scrutiny of equal protection analysis, a district court's finding must exhibit a "strong basis in the evidence" that remedial action was necessary. *Davis*, 890 F.2d at 1446. Statistical evidence of disparity sufficient to support a prima facie case under Title VII may, in some cases, constitute a strong basis in the evidence for believing that a voluntary affirmative action program was required by, and consistent with, the Constitution. *Wygant*, 476 U.S. at 292 (O'Connor, J. concurring); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *see also Johnson*, 480 U.S. at 633-34 n.11, 649.

The Union's arguments must be viewed within the historical context of this litigation. At the outset, the district court found a severe underrepresentation of minorities in four areas of the Department. Prior to the signing and approval of the consent decree, the district court determined that there existed a prima facie case of discrimination against minorities and women in the upper ranks of the Department. In addition, the evidence before the district court when it entered the order presently appealed

from indisputably showed that minorities continue to be underrepresented in both entry and promotional ranks. Finally, the results of the 1989 examination reflected an adverse impact on minority candidates. The district court determined that these statistics, coupled with the City's admission of past discrimination, established a prima facie case of discrimination. The district court's determination of prior discriminatory policies and conduct, coupled with continued evidence of discriminatory impact, satisfies the "strong basis in the evidence" test for voluntary affirmative action. *See Paradise*, 480 U.S. at 168 n.18; *Davis*, 890 F.2d at 1446-47.

The Union contends that banding, as a voluntary affirmative action program, is unlawful because there was no finding by the district court that the promotional examinations did not satisfy the requirements of the *Uniform Guidelines*. *See* 29 C.F.R. § 1607.3B (1990). The Union argues that the City may not use racial preferences in making promotion decisions without first showing that the examinations were invalid. It contends that use of race as a "plus" factor under these circumstances is an impermissible attempt to correct a racial imbalance in violation of equal protection.

We have not required that a particular examination be proven invalid in order to implement a voluntary race conscious affirmative action program designed to remedy prior discrimination. For example, in *Higgins* the employer never proved the examination invalid, yet we found the affirmative action plan constitutional. 823 F.2d at 358-60. The Union's argument is rejected.

C.

The Union argues that the City's banding proposal violates the consent decree, which requires the City to "refrain from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee." *Officers for Justice*, 473 F. Supp. at 811.

The Union contends that the banding proposal violates the consent decree because it unlawfully discriminates against nonminority candidates on the basis of race. Implicit in this contention is the claim that the consent decree prohibits the City from implementing a legitimate affirmative action plan.

The consent decree does prohibit the City from "unlawfully discriminating" in its employment decisions. However, it also contemplates race conscious relief, defined as "good faith efforts . . . to achieve certain [numerical] goals." *Id.* at 810. One of the long term goals of the consent decree is to eradicate the effects of past hiring decisions with respect to the promotion of minorities and women. It aims to increase minority representation on the police force to more closely resemble the ethnic, racial, and sexual composition of the relevant labor force. *Id.* at 815. Therefore, the consent decree itself provides a proper rationale for race conscious promotions and serves as a valid defense against the Union's reverse discrimination arguments. *Johnson*, 480 U.S. at 626-27; *Higgins*, 823 F.2d at 355.

III

The Union also contends that banding is unlawful because it is not an equally valid alternative to rank order promotions and is therefore not required or authorized by the *Uniform Guidelines*. The *Uniform Guidelines* provide that "[w]here two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact." 29 C.F.R. § 1607.3B (1990). The district court found that the banding proposal "is more valid, or substantially equally valid to strict rank ordering." We will not disturb the district court's finding that banding is a valid alternative selection device unless it is clearly erroneous. *Anderson v. Bessemer City*, 470

U.S. 564, 573 (1985); *Clady v. County of Los Angeles*, 770 F.2d 1421, 1427, 1429 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986).

The Union argues that banding is not an equally valid selection procedure because strict rank order promotions are more likely to result in the selection of the most qualified individuals. The Union contends that even though a candidate is likely to receive different scores on subsequent administrations of the same examination, it is more likely than not that the relative positions of any two candidates will remain unchanged.

The district court, after hearing extensive expert testimony, decided that the City's computation of the band was appropriate, citing approval of the same measure of statistical deviation by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977), and the Code of Federal Regulations, 29 C.F.R. § 1607.14(B)(5) (1990). The district court heard evidence that the test scores themselves are imprecise measurements of future job performance and that by banding the scores and considering secondary criteria in making promotion decisions, the City may increase the probability that the most qualified candidates will be promoted. The district court did not clearly err in finding that banding, as proposed by the City, is more valid, or at least "substantially equally valid" to rank order promotions.

The Union also contends that the City's banding proposal is improper and that strict rank order promotions are required unless the City first determines that the examination scores themselves are invalid under the *Uniform Guidelines*. This argument misconceives the application of the *Uniform Guidelines* to this case. The *Uniform Guidelines* do not forbid the use of alternative selection procedures until one procedure is proven invalid.

On the contrary, before utilizing a procedure that has an adverse impact on minorities, the City has an *obligation*

pursuant to the *Uniform Guidelines* to explore alternative procedures and to implement them if they have less adverse impact and are substantially equally valid to rank ordering. *See* 29 C.F.R. § 1607.3B (1990). It is undisputed that the results of the 1989 tests had an adverse impact against minority candidates for promotion. In this circumstance, rather than prohibiting banding, the *Uniform Guidelines* counsel in favor of its implementation to mitigate the adverse impact of the examination.

In 1989, following decades of concededly discriminatory promotional procedures, the City in concert with the Union, minority job applicants, and the court finally devised a selection process which offers a facially neutral way to interpret actual scores and reduce adverse impacts on minority candidates while preserving merit as the primary criterion for selection. Today we hold that the banding process is valid as a matter of constitutional and federal law. We do not overlook the fact that this resolution is the culmination of years of trial and error by the City and careful oversight by the district court. Although all parties were ultimately unable to agree to the proposal, we find that the efforts exerted in this process culminated in a unique and innovative program which succeeds in addressing past harms to minorities while minimizing future harmful effects on nonminority candidates. The successful efforts of all parties and the district court in reaching this resolution are to be lauded.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-73-0657 RFP
No. C-77-2884 RFP
(Consolidated)

OFFICERS FOR JUSTICE, *et al.*,
Plaintiffs,

v.

CIVIL SERVICE COMMISSION OF THE CITY OF SAN FRANCISCO, *et al.*,
Defendants,

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,
Intervenor.

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants.

ORDER RE: BANDING

[Filed August 21, 1991]

This matter comes before the court on the request of defendant City and County of San Francisco ("City") for declaratory relief regarding the use of scoring "bands" in promotional tests administered by the City's police

department. Good cause appearing, this Court hereby declares that the City's revised proposal to use banding in the selection of officers to the ranks of sergeant and assistant inspector is lawful under the Consent Decree entered in this action, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.

INTRODUCTION

The City requests this court to declare the legal validity of a proposed scoring procedure for promotion to certain ranks within the San Francisco Police Department ("Department"). The "sliding band" permits an employer to treat examination scores that fall within a statistically determined range—a "band"—as substantially equivalent for purposes of the knowledge, skills and abilities measured by the examination. The City proposes to use banding for a portion of the appointments, in order to promote a higher ratio of minority officers based on the results of examinations for the positions of Q-35 Assistant Inspector and Q-50 Sergeant, than would have been promoted under a strict rank order system.

By requesting declaratory relief, the City seeks to determine whether banding is a lawful means of fulfilling its obligations under its police affirmative action plan, which is embodied in the consent decree entered in this action. Notice of Motion and Motion for Declaratory Relief, at 2 (Oct. 9, 1990). The long range goal of the consent decree is to eradicate the present effects of past hiring and promotion practices with regard to minorities and women. Consent Decree, § VII ¶ 8, at 11 (Jan. 25, 1979).

Intervenor the San Francisco Police Officers Association ("POA"), the recognized collective bargaining agent for members of the Department, objects to the banding proposal on the grounds that it is statistically invalid and

in violation of the consent decree. Moreover, both the POA and the United States argue that the proposal violates the equal protection clause of the Fourteenth Amendment of the Constitution, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*[1] We will address each of these issues in turn.

BACKGROUND

A. History of the Litigation

A history of this action reveals the parties' and this Court's long-standing search for equitable promotion practices in the Department. The litigation dates back to 1973, when an organization of minority and female police officers called Officers for Justice ("OFJ"), along with eleven individuals and four other organizations,[2] filed a class action lawsuit alleging employment discrimination in hiring, promotion and job assignments based on race and sex in the Department. The action charged the Department with having promulgated a widespread pattern and practice of racial and sexual employment discrimination, in violation of 42 U.S.C. §§ 1981 and 1983.

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[1] Section 703(a) of the Act, 78 Stat 255, as amended, 86 Stat 109, 42 U.S.C. § 2000e-2(a), provides that it "shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[2] The other organizations were the National Association for the Advancement of Colored People (Western Region), League of United Latin American Citizens, Chinese for Affirmative Action, National Organization of Women.

and sections of the United States and California Constitutions.[3]

As later noted by the Ninth Circuit, the complaint "set forth a rather forceful statistical demonstration." *Officers for Justice v. Civil Service Com'n, et al.*, 688 F.2d 615, 618 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). The statistics reflected striking differences between the racial and sexual composition of the Department and that of the city. Certain groups appeared to be vastly underrepresented in the upper ranks of the Department. *Id.* at 618-19.

Plaintiffs moved this District Court for, *inter alia*, declaratory, preliminary, and permanent injunctive relief. Having found a prima facie case of racial discrimination with respect to the entry-level hiring of patrolpersons [4] and promotions to the rank of sergeant [5], the Court enjoined the further use of entry-level and sergeant-level promotional examinations. *Officers for Justice v. Civil Service Com'n, et al.*, 317 F.Supp. 1328, 1342-43 (N.D. Cal. 1973). The number of minority applicants taking the examinations for promotions to ranks higher than sergeant was found to be too small to establish a prima

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[3] Shortly after the OFJ suit was filed, the POA was granted leave to intervene as a party defendant. In December, 1977, the United States filed a separate action, alleging a pattern and practice of discrimination similar to that challenged in the original suit. The two actions were consolidated in January, 1978.

[4] For the years 1969 to 1973, 54 percent of whites taking the entry-level admission examinations passed, while only four percent of blacks passed, fifteen percent of Latinos, and 32 percent of Asians.

[5] For the January 9, 1971 administration of the promotion-level sergeant examination, eighteen percent of 642 whites who took the examination passed, while none of the 35 blacks passed, 12.5 percent of the 24 Latinos, and none of the three Asians passed. This court also found that less than three percent of the sergeants in the police department at that time were black, latino, or asian. *Officers for Justice*, 371 F.Supp. at 1333.

facie case of racial discrimination. *Id.* at 1333-34. The Court ordered that future examinations and selection procedures were to be submitted to the court for review and approval. *Officers for Justice*, 688 F.2d at 619.

In January, 1977, plaintiffs sought preliminary injunctive relief from the examination used for promotions to the assistant inspector rank. Although in 1973 we found that plaintiffs' statistical demonstration was insufficient to establish a prima facie case of racial discrimination for assistant inspectors, plaintiffs in 1977 produced the results of more recently administered examinations in which a substantial number of minorities had participated. Preliminary relief was granted. *Officers for Justice v. Civil Service Com'n, et al.*, 20 FEP Cases 1309 (N.D.Cal. 1977).

In 1978, trial began on the discrimination issues remaining. Approximately two weeks after the beginning of trial, the trial was recessed and the parties negotiated a proposed consent decree. A hearing on the fairness of the decree was held on March 5, 1979, and the decree was approved by the court.[6] The POA signed the consent decree on behalf of its members.

The decree set forth various requirements and goals applicable to the City's recruitment, hiring and promotional practices in the San Francisco Police Department. It provided for specific, definable and good faith efforts to be made by defendants to achieve certain goals for employment of women and minorities within specified periods of time. As a basic matter, the decree prohibited the City from using any examinations which have a disproportionately adverse impact against minorities or females, unless the examination is validated pursuant to the Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. 50.14; Consent Decree ¶ 4. The consent decree

[6] *Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801 (N.D.Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983).

specifically prohibits the City from unlawfully discriminating in any manner on the basis of sex, race, or national origin.

The decree also specifies annual and long-term hiring and promotional goals. In particular, it sets an annual objective of selecting minorities and females to those positions in proportion to their representation in the qualified applicant pool. The decree provides for a long-term goal of 45 percent minority representation in the Department. In order to facilitate achievement of these goals, the decree obligates the City to use reasonable efforts to give leadership experience to minorities and women in making temporary appointments.

In order to discharge its obligations under the consent decree, the City established a Consent Decree Unit and charged it with developing and administering the promotional examinations. In 1983, the Unit administered the Q-35 and Q-50 examinations for promotions to the civil service ranks of assistant inspector and sergeant. The procedures included a written multiple choice examination, a written communications examination and a structured oral examination. Using the weights set by the Civil Service Commission, the examination scores showed disproportionate adverse impact on minorities and women. The OFJ and United States filed objections under the consent decree to the City's use of the examination results for both the Q-35 and Q-50 tests. After a series of negotiations, the City attorney recommended a revised weighting system which substantially eliminated the adverse impact of the selection process.

After protesting the reweighting of the examination components, the POA and three of its members filed an action for declaratory and injunctive relief in the Superior Court for the City and County of San Francisco, claiming that the reweighting violated the City Charter and Civil Service Rules. The City removed the action to this court. This court ruled that the reweighting of the

examination components was a permissible affirmative action plan.[7] The POA appealed. In 1986, consistent with this court's ruling, the City made permanent appointments to the ranks of Q-35 and Q-50 based on the reweighed examination results.

The Ninth Circuit subsequently ruled that the reweighting had been improper because it unlawfully displaced candidates on the basis of their race and gender. The court concluded that the City was required to administer new examinations.[8]

The City petitioned the Ninth Circuit for rehearing and, in its second opinion, the Ninth Circuit held that the appointments made from the reweighed results should not be set aside, because it would be inequitable to penalize those who had been appointed. The court explicitly found that none of the officers who might have been appointed from the original list before the reweighting occurred had acquired any rights, since the original scores were invalid.[9]

The POA then petitioned for further rehearing and, in its third opinion, the Ninth Circuit reversed this court's original judgment, but ordered no further remedies.[10] The POA petitioned for review by the United States Supreme Court and, in October 1989, the Supreme Court denied the petition.

On August 10, 1989, this Court directed the City to administer examinations by December, 1989 for the ranks

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[7] *City and County of San Francisco v. San Francisco Police Officers' Ass'n.*, 621 F.Supp. 1221 (N.D.Cal. 1985).

[8] *San Francisco Police Officers' Ass'n v. City and County of San Francisco*, 812 F.2d 1125 (9th Cir. 1987).

[9] *San Francisco Police Officers' Ass'n v. City and County of San Francisco*, 842 F.2d 1126 (9th Cir. 1988).

[10] *San Francisco Police Officers' Ass'n v. City and County of San Francisco*, 869 F.2d 1182 (9th Cir. 1988).

of sergeant (Q-50) and assistant inspector (Q-35). The examinations had been delayed for three years and it had been six years since the last sergeant and assistant inspector examinations were offered. The order also required the City to appoint 100 sergeants and 60 assistant inspectors from the results of these exams. Half of these appointments were due by June 30, 1990, and the remainder by July 31, 1990. The City administered examinations for the ranks of Q-35 and Q-50 in November and December, 1989, respectively. Prior to the administration of these examinations, the Consent Decree Division of the Police Department made available informational aids for those members taking the examinations. This pre-examination material included a question and answer session and a training video for those who were taking the Q-50 examination. The materials were made available to all members of the Department. Notice of the training session was mailed to the home addresses of candidates.

The 1989 examinations again resulted in adverse impact on minorities. Under the "four-fifths rule" of the Uniform Guidelines on Employee Selection Procedures, adverse impact exists when the selection rate of minorities is less than 80 percent of the selection rate of non-minorities. 29 C.F.R. § 1607.5 (1990). If the City were to promote 100 persons to the rank of sergeant in strict rank order, the selection rate for minorities would be approximately 48 percent of the selection rate for non-minorities. Similarly, if the City were to appoint 60 inspectors in strict rank order, the "adverse impact ratio" of the pass rate of minorities to non-minorities would be fourteen percent. Hurley Decl., Exh. B, C.

On June 30, 1990, the City complied with the requirements of the Court's August 10, 1989 order by making 50 temporary appointments to the rank of sergeant and 30 temporary appointments to the rank of assistant inspector. Because of the adverse impact and the anticipated challenges to the validity of the exams, the City

sought an extension of the July 31 deadline until the controversy over a selection procedure was resolved. By an order dated July 31, 1990, this Court partially granted the City's request. The order required the City to make all but ten sergeant promotions and eight assistant inspector promotions. The City's obligations to make the remaining appointments were suspended for 60 days to permit the parties to negotiate proposals to use banding as an alternate selection procedure.

Negotiations among the POA, OFJ and the City failed to produce agreement concerning the appropriate response to the adverse impact of the tests. The parties agreed to extend the deadlines for making the remaining promotions and presented formal challenges to the tests' validity. By an order dated October 3, 1990, this Court postponed the City's obligations to make the remaining promotions pending a resolution of the controversy concerning selection procedures. It is this issue of the City's proposed banding selection procedure that is before the Court today.

The City is under Court order to offer the next Q-35 and Q-50 examinations by February 1993. However, the City is under no obligation to make any appointments from the lists generated by these examinations. This is the last promotional obligation of the City under the consent decree.

B. The Sliding Band

The City proposes to use the "sliding band" scoring method developed by Dr. James Outtz. The "sliding band" operates on the principle that for purposes of promotion, scores that fall within a certain fixed range should be treated as substantially equivalent. This fixed range is claimed to be statistically defensible, so that where scores are not separated from each other by a statistically significant difference, the scores are treated as identical for purposes of determining eligibility for promotion. In the

instant case, the band range, on a 100 point scale, is approximately 4.00 points for the Q-35 examination, and 5.48 points for the Q-50 examination. The Q-35 band extends from a score of 66.282 to a score of 62.286 on a 100-point scale, and encompasses 52 (out of 747) candidates. The Q-50 band extends from a score of 67.553 to a score of 62.339 and encompasses 71 (out of 831) candidates.

Banding proceeds from the notion that an individual will not achieve an identical score on different administrations of the same examination. As a result of inevitable measurement error, employers who hire based on strict rank order do not always make the correct comparative choice. The smaller the difference between observed scores, the more likely it is that the score differences resulted from measurement error rather than true differences in skill and abilities for the job. The City argues that by applying statistically defined "bands" to actual test scores, the employer can tell, with a certain risk of error, how large a difference between observed scores reliably represents differences in qualifications.

The widths of the bands are determined by the use of well-worn statistical principles which reflect the reliability of the examinations. The City will treat persons below a band of scores as less qualified than the person with the highest score in the band. The City will consider persons within a band as not reliably different from each other with respect to job qualifications as measured by the examinations. That is, the City will not hire outside the band before the top scorer in a band is hired, thus ensuring that the top scorer in a band will not be passed over by someone who the City considers, to a certain statistical level of confidence, to be less qualified for the job.

Five experts testified for two and a half days regarding the statistical validity of the City's proposal. We agree with the City's experts, and conclude that banding

is of equal or greater validity than strict rank ordering. The formula used by the City to determine the width of the bands was 1.96 multiplied by the "standard error of measurement" ("SEM"). The SEM was derived from the following formula: SEM equals the standard deviation multiplied by the square root of one minus the reliability coefficient. The standard deviation measures the amount of variance on either side of the mean of an examination. On a normal distribution, 95 percent of the scores fall within plus or minus two standard deviations from the mean score. The reliability coefficient is an index of the consistency or lack of consistency among various components of the examination as a measure of relevant job qualifications.

An individual's test score reflects, to greater or lesser degrees, random chance factors that distort the examination process as a measure of individual abilities. In theory only, each candidate has a "true" score that is uninfluenced by chance factors. The standard error of measurement defines the limits of variance around an observed score within which the City assumes a candidate's true score might fall.

The City multiplied the examinations' SEM by a so-called "C" factor of 1.96 to derive the final band widths. The "C" factor represents a statistical convention termed a "confidence interval". One of the City's statistical experts characterized confidence intervals as a "standardized fashion" for determining whether the difference between observed scores is significant enough to reject the possibility that two individuals' scores are equivalent. In this case, the City is measuring the possibility of whether the difference between the top score in a band and any other score in the band is significant enough to reject the hypothesis that the two scores are equivalent. While the data cannot prove the scores are equivalent, the data can tell the employer the degree of likelihood that difference in test scores occurred by chance. Statistical theory

teaches that if the two scores are separated by greater than a factor of 1.96 times the SEM, then the probability of that difference occurring by chance is less than five percent.[11] Conversely, if the difference between the two scores is equal to or less than 1.96 times the SEM, there is at least a five percent chance that the difference reflects chance variables rather than true differences.

We agree that the City's application of these principles to the examinations is appropriate. A "C" factor of 1.96 has been used by both the Supreme Court and the Uniform Guidelines to show statistical significance. *See Castaneda v. Partida*, 430 U.S. 482, 496-97, n. 17 (1977); 29 C.F.R. § 1607.14(b)(5). The band is of a width large enough for the City to conclude, based on the test scores, that persons with scores below the band have a true score that is lower than the top scorer within the band. That is, the City is permitted to conclude that there is no greater than a five percent probability that candidates outside a band of scores have a "true" score equal to the highest score in the band. The Second Circuit has approved in dictum the City's statistical concepts. *Guardians Ass'n of New York City v. Civil Serv.*, 630 F.2d 79, 102-03 (2nd Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) (finding that to have 95 percent confidence that an applicant's grade has statistical reliability, grades within two standard deviations of his grade should be treated as equivalent to his grade, since there is a 95 percent likelihood that each applicant would score within such a range on successive takings of equivalent tests).

Under the "sliding" band system, once the person who achieved the highest score within a certain band is selected, the band "slides" down and the next highest score serves as the reference point. The band would then extend from this next highest score to the score encom-

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[11] This formula derives from the fact that approximately 95 percent of cases fall within plus or minus two standard deviations on a normal distribution.

passed below by the width of the band. Thus, it is assured that no candidate may be passed over for someone below the band; that is, no candidate will lose their promotion in favor of one whose score is statistically significantly lower than theirs.

A separate issue remains concerning the selection of candidates from the pool within the band. The City and OFJ originally proposed to select the minority candidates from within the band first, before selecting non-minorities from within the same band. When no minorities remained within a given band, the highest scoring candidate would be selected, thus "sliding" the band down to encompass those candidates, possibly minority candidates, who scored within the band extending down from the next highest score. In other words, if minorities were situated "next in line" down the list of scores, the City would have appointed the highest-ranking candidates in the band so that minority candidates could be included in the band. Thus, race considerations were paramount in the City's original proposal to select within the band.

On June 6, 1991, the court struck down the City's proposal on the ground that the City's plan to use race as a sole criterion for selection within the band was impermissible under the Supreme Court's decision in the *University of California Regents v. Bakke*, 438 U.S. 265 (1978), and the Ninth Circuit's decision in *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989). *Officers for Justice v. Civil Service Commission of San Francisco*, No. C-73-0657-RFP; C-77-2884-RFP (June 6, 1991). The court, however, recognized that banding as a concept was acceptable, and that a modified proposal, resembling that presented by the Second Circuit in *Bridgeport Guardians v. City of Bridgeport*, 933 F.2d 1140 (2nd Cir. 1991), would be reconsidered. On June 28, 1991, the City submitted a revised proposal which suggested the use of several job-related criteria for selection within the band, in addition

to affirmative action goals. It is this proposal that is before the court today.

The City's proposal to apply the banding method is limited to a relatively small portion of the sergeant candidate pool. Out of the candidate pool for assistant inspectors of 831 persons, and a candidate pool for sergeants of 747 persons, the City proposes to make 100 sergeant appointments in rank order, in keeping with the City's obligations under this Court's August 19, 1989 order. Next, the City would institute banding to create one band for sergeants in order to appoint fifteen additional sergeants. Sixty assistant inspector appointments would be made in strict rank order. Although additional assistant inspector appointments are not proposed at this time, the City proposes to use banding for future assistant inspector promotions.

DISCUSSION

The POA and the United States object to the City's proposal on several grounds. The POA argues that the band is statistically invalid and that the proposal violates the consent decree. The POA and the United States further argue that the race-conscious selection proposed is in violation of the equal protection clause of the Fourteenth Amendment and Title VII. The City requests the Court to rule upon the legal validity of their proposal.

We decide today that the City's revised proposal is psychometrically sound. We further find that the proposal is not in violation of the consent decree entered in this action, Title VII, or the equal protection clause of the Fourteenth Amendment, and is therefore lawful.

A. Violation of the Consent Decree

The POA argues that by instituting banding, the City would violate its police affirmative action plan, which is embodied in the consent decree entered in this action.

The POA is a signatory to the consent decree, and does not contest its validity. Further, the banding proposal is consistent with the stated goals of the decree, since it will increase the potential minority representation in the police department. One of the long range goals of the consent decree is to eradicate the present effects of past hiring and promotion practices with regard to minorities and women. Consent Decree, § VII ¶ 8, at 11 (Jan. 25, 1979). To this end, the consent decree seeks to recruit, appoint and promote qualified minorities and women in sufficient numbers so as to increase substantially the minority and female composition of the San Francisco Police Department so that it more nearly reflects the racial, ethnic and sexual composition of the relevant labor force of San Francisco. *Id.* More specifically, the long-term goal of defendants is to raise the minority representation to 45 percent of the sworn personnel of the police department. *Id.* With regard to sergeants and assistant inspectors, the consent decree provides an annual goal of selecting minorities "in proportion to their representation in the qualified applicant pool." Consent Decree ¶ 10.a(3).

The consent decree incorporates the standards under the Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607.1, *et seq.* ("Guidelines") for evaluating promotional examinations which have an adverse impact on minorities. *Officers for Justice v. Civ. Serv. Comm.*, 473 F.Supp. 801, 812 (N.D. Cal. 1979).[12] As pointed out by the Ninth

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[12] The Consent Decree mandates that

> [t]he City shall, except as provided herein, make no further use of tests or other selection qualifications, standards or procedures for hiring or promotion within the San Francisco Police Department the use of which has been enjoined by previous orders of this Court, or any tests, qualifications, standards or other procedures within said Department which have a disproportionately adverse impact against minorities or females, unless and until such standards have been shown to be valid, pursuant to the *Uniform Guidelines on Employee Selection Procedures*, 43

Circuit, the consent decree specifically forbids the City from using tests or other selection criteria that demonstrate an adverse impact "unless and until" the City proves the procedures are valid under the Guidelines. *San Francisco Police Off. Ass'n v. San Francisco*, 812 F.2d at 1129 (9th Cir. 1987).

The Uniform Guidelines permit employers to use different selection procedures that do not have an adverse impact on minorities and women as an alternative to validating challenged test procedures. *See id.* (citing 28 C.F.R. § 1607.6A (1986); Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 12,001, Question and Answer n. 31 (1979)). Indeed, under the Ninth Circuit's interpretation, in the instant case, the Uniform Guidelines require the City to throw out the challenged procedure rather than validate it. *Id.* at 1130.

> In order to validate a selection procedure under the Uniform Guidelines, the employer must consider alternative selection procedures. 29 C.F.R. § 1607.3B (1986). In examining alternatives, the employer should also examine alternative methods of using the selection procedure. 29 C.F.R. § 1607.5G (1986); 43 Fed. Reg. 38,290, 28,291 (1979). For example, an employer may find that a selection procedure that is valid when scored on a pass/fail basis is invalid when used as a ranking device. 29 C.F.R. § 1607.5G (1986). The alternative selection procedure should be used when it has less adverse impact and when the evidence demonstrates that its validity is substantially the same or greater than the challenged procedure. 29 C.F.R. § 1607.3B (1986); 43 Fed. Reg.

Fed. Reg. 38290 Aug. 25, 1978, or any superseding federal guidelines.

11,996, 12,003-04, Questions and Answers Nos. 50-51 (1979).

Id. Thus, where an alternative method of use exists that is of equal or greater validity and decreases adverse impact, the alternative method must be used.[13]

In the case at hand, extensive expert testimony has shown that banding is an alternative method of use of the selection procedure that is of greater validity than, or substantially equally valid to the challenged procedure.

Indeed, rank ordering as a concept should be viewed with suspicion. The Guidelines provide that rank ordering may be used where "a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance . . ." 29 C.F.R. § 1607.14(c)(9). The Second Circuit has interpreted this section to require that, when disparate impact results from an examination, the use of rank ordering must be closely scrutinized, and the user should demonstrate the relationship between better scores and better job performance. *Guardians Ass'n of New York City v. Civil Service Comm'n*, 630 F.2d at 100.

> This close scrutiny is required because rank-ordering makes such a refined use of the test's basic power to distinguish between those who are qualified to perform the job and those who are not. . . . The frequency with which . . . on-point differentials are used for important decisions in our society, both in academic assessment and civil service employment, should not obscure their equally frequent lack of demonstrated significance. Rank-ordering satisfies a

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[13] Validation of the challenged procedure is not required before developing an alternative selection procedure. *San Francisco Police Officers Ass'n*, 812 F.2d at 1130 n. 6. Indeed, the City is required to explore alternative procedures and use them in lieu of validating the challenged procedure, if the alternative has less adverse impact and is equally job related. *Id.*

> felt need for objectivity, but it does not necessarily select better job performers. In some circumstances the virtues of objectivity may justify the inherent artificiality of the substantively deficient distinctions being made. But when test scores have a disparate racial impact, an employer violates Title VII if he uses them in ways that lack significant relationship to job performance. Permissible use of rank-ordering requires a demonstration of such substantial tests validity that it is reasonable to expect one or two-point differences in scores to reflect differences in job performance.

Id. at 100.

We agree that rank ordering should be scrutinized where adverse impact results. In the City's proposal, a determination of the band width takes into account the test's reliability. The City has shown that the examinations can reliably differentiate only between the top scorer in a band and candidates below the band, and thus, the City will not hire outside the band before the top scorer in a band is hired. Percentage point difference in scores cannot likewise be reliably differentiated. We find the band to be psychometrically sound, and thus, the City has shown that banding is of equal or greater validity than strict rank ordering.

Banding also potentially decreases adverse impact by creating the possibility that minorities within the band who otherwise would not have been selected, will be promoted. Like in the case of *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d at 1145, this court is unpersuaded that uncertainty about the ultimate results of banding should preclude its implementation. The banding process will put some of the minority candidates in a better position to be considered for promotion, thus eliminating at least some of the disparate impact found to have been caused by the examination. *Id.* at 1148. The

reason is that on both examinations minority candidates tend to be clustered farther down on the eligible lists, and the percentage of qualified minority candidates available for promotion will increase the farther down the list the City moves to make its appointments. Since the sliding band allows for the consideration of a greater number of individuals for any particular promotion, qualified minorities will have a greater opportunity to be promoted through the use of a sliding band.

We have found that the banding alternative will create the possibility of decreasing the adverse impact of the examinations and is more valid, or substantially equally valid to strict rank ordering. Thus, the City cannot validate the strick rank ordering method of use of the selection procedure as required by the consent decree because an alternative selection procedure exists that is equally or more job related but has potentially less adverse impact. *Officers for Justice*, 812 F.2d at 1130 n. 6. The application of banding, therefore, is required under the Consent Decree if it is otherwise reasonable and lawful. *Id.*; *see* 29 C.F.R. § 1607.3B (1986).

Under the terms of the consent decree, the City is required to:

> refrain from engaging in any act or practice which has the purpose and effect of unlawfully discriminating against any employee of, or any applicant or potential applicant for employment with, the San Francisco Police Department because of such individual's race, sex or national origin.

The POA contends that, like the previous reweighting proposal disallowed by the Ninth Circuit, the City's banding proposal is in violation of the consent decree in that it unlawfully discriminates against non-minorities on the basis of race. However, as discussed more fully below, this court finds that the City's proposal is valid under both the Fourteenth Amendment and Title VII. The

City's race-conscious banding proposal does not constitute "unlawful discrimination" under the consent decree. In effect, the POA argues that the consent decree prohibits the City from taking affirmative action. Because intervenor's argument "would require us to disregard the underlying purpose of the City's legitimate affirmative action plan, . . . we reject it." *Higgins*, 823 F.2d at 353.

B. Title VII

The POA charges that the City's proposal violates Title VII. In a declaratory relief action, the burden of proof as to the substantive right involved rests on the "true" plaintiff. W. Schwarzer, A. Tashima, & J. Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 10:44 at 10-10 (1991). The true claimant in this action is the POA, which would have brought a reverse discrimination suit had the City proceeded to employ banding without seeking a declaratory judgment.

Once a plaintiff in a Title VII action establishes a *prima facie* case that race or sex has been considered in the employment decision, the burden shifts to the employer to show a legitimate nondiscriminatory reason for the decision; an affirmative action plan can be one such reason. *Higgins*, 823 F.2d at 355. Once the employer satisfies this requirement, the burden shifts back to the plaintiff to show that the asserted nondiscriminatory reason is a pretext and that the affirmative action plan is invalid. *Id.*

The City proposes to take race into account in selecting from within the band. Thus, the POA has established a *prima facie* case of discrimination. *Higgins*, 823 F.2d at 355. The City has alleged that it proposed banding in order to fulfill its obligations under its police affirmative action plan, which is embodied in the consent decree entered in this action. Thus, the burden shifts to the POA to show that this nondiscriminatory reason is invalid.

The Ninth Circuit in *Higgins* has laid out the standards of invalidity under Title VII. 823 F.2d at 355 (citing *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)). Since the City's proposal is a voluntary affirmative action plan, the first issue the court must consider is whether the decision to consider race in the banding proposal is justified by the existence of a "manifest imbalance" that reflects underrepresentation of minorities in "traditionally segregated job categories." *Higgins*, 823 F.2d at 356; *Johnson v. Transportation Agency*, 480 U.S. 616, 628-30 (1987) (quoting *Weber*, 443 U.S. at 197). This statistical analysis is more flexible than that needed to show a *prima facie* inference of discrimination. *Johnson*, 480 U.S. at 632-33.

The City has satisfied this requirement. The original complaint in this action, filed in 1973, "set forth a rather forceful statistical demonstration," which reflected that racial minorities and women "appeared to be vastly underrepresented in the upper ranks of the Department." *Officers for Justice*, 688 F.2d at 618-19. This court had previously found a *prima facie* case of racial discrimination with respect to promotion to the ranks of sergeant, *Officers for Justice*, 371 F.Supp. at 1342-43, and assistant inspector. *Officers for Justice*, 688 F.2d at 619. These, among other things, resulted finally in a trial, and the consent decree, which sets forth the goals of increasing minority and female representation in the sworn personnel of the Department, and particularly the promoted ranks.

Likewise, in the instant litigation, the City has produced evidence to show not only the required "manifest imbalance" in the promoted ranks of the police department, but also a *prima facie* case of such discrimination. The proper form of statistical analysis to produce a *prima facie* inference of discrimination for skilled labor, is to show a significant statistical disparity between the skilled ranks and the "relevant labor pool"; that is, the labor

pool possessing the skills necessary to be eligible for the skilled positions. *United States v. San Francisco*, 696 F.Supp. 1287, 1302-03 (N.D. Cal. 1988) (where promotions are made entirely from the lower ranks and there is therefore no outside labor pool, the probative statistical comparison is between the percentage of minorities in each of the upper ranks and the percentage of minorities in the qualifying rank below); *Hazelwood School District v. United States*, 433 U.S. 299, 305 (1977).

As a primary matter, at the Q-2 level (from which promoted officers are selected), minorities continue to be underrepresented. The consent decree states that a long term goal is to achieve a 45 percent representation rate in the Department. In 1990, the city and county of San Francisco showed a minority population of 46.4 percent.[14] However, as of September, 1990, only 33.1 percent of the Q-2 rank was minority. Stipulated Labor Pool Data, Exh. A (Dec. 21, 1990). The combined ranks of inspector/assistant inspector today is only fifteen percent minority. *Id.* Minorities constitute 23 percent of Department sergeants.

In addition to this underrepresentation at the Q-2 level, the minority officers suffer from statistically significant underrepresentation in the promoted ranks of assistant inspector and sergeant, relative to the Q-2 rank. By comparing the percentage number of minorities that currently serve as assistant inspectors and sergeants to the number of minorities serving in the pool of Q-2 officers the City has made a *prima facie* case of discrimination in the promoted ranks at issue here, such that voluntary affirmative action in those ranks is justified.

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[14] 1990 Census of Population and Housing, Summary Tape File 1, San Francisco Dept. of City Planning, Office of Analysis and Information Systems, at 1. The figures for the city and county of San Francisco, rather than those for the Nine-County Bay Area, more closely resemble the correct comparative figure for the Department, since the Department has a requirement that its members reside in San Francisco.

The Supreme Court has laid out a method of measuring the significance of statistical disparities in *Castaneda v. Partida*, 430 U.S. 482 (1977). It involves calculation of the "standard deviation" as a measure of predicted fluctuations from the expected value of a sample. "If the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [result] was random would be suspect to a social scientist." *Id.* at 496 n. 17. The *Castaneda* test was employed for Title VII employment discrimination cases in *Hazelwood School District v. United States*, 433 U.S. 299 (1977). Using the 33.1 percent figure (the percentage of minorities at the Q-2 level) as the basis for calculating the expected value, the difference between the observed and expected values for assistant inspectors was 4.41 standard deviations in September, 1990. For sergeants, the difference amounted to 2.70 standard deviations. The figure of 2.70 means that the odds that the actual distribution is random is close to one in fifty. D. Baldus & J. Cole, Statistical Proof of Discrimination, § 9.03 at 297 (1980). The 4.41 figure means that the chance that the distribution of minorities in the promoted ranks occurred by random chance, is virtually zero. *Id.*

We are aware that in *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 551 (1982), the Ninth Circuit rejected a finding of 2.46 standard deviations, and warned that courts should be "extremely cautious" of drawing any inferences from standard deviations in the range of 1 to 3. However, *Johnson* appears to suggest that the statistical disparity for a voluntary affirmative action case should be more flexible than that needed to meet the *prima facie* standard in other cases. Unlike the case in *Gay*, the showing of disparity between the expected and observed percentage representation is not produced to show a violation of Title VII. Rather, the purpose of the showing of disparity is to support a voluntary affirmative action plan. This voluntary disclosure of evi-

dence of past discrimination should be accorded deference.[15] Because such an imbalance is evident from the facts in this case, we conclude that a *prima facie* case of a violation of Title VII has been shown.

Where a finding of manifest imbalance justifies a consent decree's affirmative relief, the decree may be approved provided it does not "unnecessarily trammel the interests of the White employees" or create an "absolute bar to the advancement of White employees." *Johnson*, 480 U.S. at 637 (voluntary affirmative action plan, Title VII analysis); *Weber*, 443 U.S. at 208, *Higgins*, 823 F.2d at 357; *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1448 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 248 (1990).

Like the affirmative action plans found in *Weber* and *Higgins*, the instant plan establishes no quotas. The plan "merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants." *Higgins*, 823 F.2d at 357. In *Universtiy of California Regents v. Bakke*, 438 U.S. 265 (1978), the Court required that "[n]o persons are automatically ex-

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[15] Voluntary compliance is the preferred means of achieving the objectives of equal employment opportunity embodied in Title VII. *OFJ v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Local #93 v. City of Cleveland*, 478 U.S. 501, 92 L.Ed.2d 405, 419 (1986); *see Johnson*, 480 U.S. 616 (1987); *Kirkland v. NY State Dept. of Correctional Services*, 711 F.2d 1117, 1128 (2nd Cir. 1983) (voluntary compromises of Title VII actions enjoy a presumption of validity), *cert. denied*, 465 U.S. 1005 (1984). In the instant case, the City voluntarily seeks to avoid a Title VII violation by using a method of use of a selection procedure that has potentially less adverse impact and equal or greater validity than the challenged procedure. Thus, the City's proposal should be accorded deference. Further, "[t]he value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." *Wygant*, 476 U.S. 267, 290 (1986).

cluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *See Johnson*, 480 U.S. at 638. In the instant matter, once the pool of qualified applicants is assembled, the City may take race into account in rendering its final decision. *Higgins*, 823 F.2d at 357. However, every qualified applicant is considered.

In *Johnson*, 480 U.S. 638, the County's affirmative action plan had a sufficiently limited effect on males, since the plaintiff "had no absolute entitlement to the road dispatcher position" because the Agency Director was authorized to grant the promotion to any of the seven qualified applicants. *Id.* Similarly, in this case, the nonminority police officers have no absolute entitlement to the promoted ranks. The officers who took the examination had hope of promotion, but none had an entitlement to promotion.

The third relevant factor discussed by the Court in *Johnson* was that, while being denied a discrete promotion, plaintiff Johnson retained his job, salary, seniority, and eligibility for future promotions. *Id.*, 480 U.S. at 638 *cited in Higgins*, 823 F.2d at 357. In this case as well, all of the officers who took the promotional examination either are promoted, or retain their present positions.

Finally, an express assurance that a program is temporary is unnecessary when the employer "has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, on which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees." *Johnson*, 480 U.S. at 640. We find that the City's proposal is such a gradual approach to the elimination of the imbalance in its promoted ranks. The proposal provides for consideration of race only insofar as the merit principle can be preserved, making it a moderate and gradual remedy. *Higgins*, 823 F.2d at 357.

The Ninth Circuit struck down the previous plan to reweight examination components, on the ground that the plan was an impermissible manipulation of test results that unnecessarily trammeled the interests of the nonminority test takers. "Candidates who participate in promotional examinations," the Ninth Circuit found, "expect to have an equal opportunity to score well and to achieve promotion. This neutrality cannot exist if the City can rescore the examinations to achieve a particular race and gender balance after it analyzes the results. Permitting an employer to rescore examinations with knowledge of the ultimate results undermines the integrity of the examination process." *San Francisco Police Officers Ass'n*, 812 F.2d at 1132. That court found that because applicants had prepared for the most heavily weighted components of the examination, and subsequent to the administration of the test the scores were reweighted to achieve a particular race and gender result, the integrity of the examination process was compromised and the rights of nonminority applicants were undermined. This harm to nonminorities was found to be unnecessary because a less burdensome alternative, such as administering a new selection procedure, would have better achieved the goals of the consent decree without violating Title VII. *Id.*

Here, we have found no such violation of Title VII. The City's proposal does not violate the Ninth Circuit's order that "protects against scoring standards being set before examination and then changed after examination." *San Francisco Police Officers Ass'n*, 812 F.2d at 1184. Banding will not alter or manipulate the scores of candidates; nor will it allow the selection of candidates whose scores are statistically, reliably lower over other candidates.

Moreover, banding was discussed as a possibility prior to the administration of the examinations. Before the examinations were given the Consent Decree Division

prepared questions and answers to inform candidates about the nature of the examination and selection process. Candidates were informed that banding of scores was possible.[16] *See* Hurley Decl., Exh. A. The answers

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[16] Prior to the administration of the Q-35 and Q-50 examinations, the Consent Decree Division made available informational aids for those members taking the examinations. The materials were made available to all members of the Department. Notice of the training session, which included questions and answers, was mailed to the home addresses of the candidates. Questions 15 and 16 of the Consent Decree's questions and answers read:

Q. Is there any possibility that examination scores will be "banded" rather than placed in strict rank order such as what happened in the Fire Department?

A. The Department does not have a current plan to band scores. Depending upon the reliability of scores and based upon opinions of the examination consultants and experts, examination scores could conceivable be "banded" in a manner similar to what occurred in the Fire Department.

"Banding" of scores refers to a procedure where a group of scores which are not identical are considered to be equivalent. For example, it is common in grade schools for scores 90 to 100 to be scores as an "A" with no distinction made among those who received 99 points versus 91. Banding of scores is a way to address the concern that differences among scores within the width or range of the band are not significantly different from each other due to some degree of measurement error in the testing process. The underlying concept in banding is that due to measurement error, scores that are very close together; e.g., 91 and 92, may not be statistically significantly different from each other and therefore in fairness they should be treated as the same score. The Fire Department utilized a banding procedure for two recent eligible lists.

Q. If scores are "banded", what criteria would be used to select persons for appointment within the band?

A. Since scores within a band are considered equivalent, persons in the band are more or less "tied" for rank order. If this were to occur, appointments are made at the Chief's discretion. The consent decree requires that some consideration be given to avoid adverse impact against minorities and women. Beyond that, the Department proposes to use a random, impar-

also acknowledged that the Department was interested in avoiding adverse impact against minorities and women in making selections from within the bands. *Id.* The bands do not manipulate the scores, but compare the separate scores according to what those scores can statistically reliably say about the abilities of the candidates.

For all of these reasons, we hold that the City's banding proposal is in conformity with Title VII.

C. Equal Protection Clause

In this "reverse discrimination" case, it is the true plaintiffs, the POA and the United States, that must bear the burden of demonstrating that the rights of the non-minority police officers have been violated. *Wygant v. Jackson Board of Education*, 476 U.S. 269, 292 (1986) (O'Connor J., concurring).

Government bodies constitutionally may adopt racial classifications as a remedy for past discrimination. *Higgins*, 823 F.2d at 358; *Davis*, 890 F.2d at 1445 (citing *U.S. v. Paradise*, 480 U.S. 149, 166 (1987)). In order to pass muster under the equal protection clause, the City's race-based remedy must survive the most elevated scrutiny of the courts. In *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the Supreme Court adopted the strict scrutiny analysis of the plurality in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986) in testing race-conscious measures. The means chosen must be "narrowly talored" to achieve a "compelling government interest." *Wygant*, 476 U.S. at 274.

The compelling government purpose here, like all other cases involving affirmative action plans, is to remedy prior discrimination. This purpose is articulated in the consent decree. If proven, this reason is valid. *Paradise*, 107 S.Ct. at 1065.

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tial method such as those commonly used by Civil Service to break tied scores.

Equal protection requires evidence of past discrimination by the particular employer at issue in order to justify affirmative race-conscious relief. *U.S. v. San Francisco*, 696 F.Supp. at 1302. The Ninth Circuit has used the "strong basis in evidence" standard articulated by Justice O'Connor in *Croson* for a finding of past discrimination sufficient to justify a public employer's voluntarily undertaken plan. *Davis*, 890 F.2d at 1446. In her concurring opinion in *Wygant*, Justice O'Connor suggested that statistical evidence of disparity sufficient to support a *prima facie* case under Title VII would constitute a strong basis in evidence for believing voluntary affirmative action was required, consistent with the Constitution. *U.S. v. San Francisco*, 696 F.Supp. at 1302 (citing *Wygant*, 476 U.S. at 292; *Johnson*, 480 U.S. at 649 (O'Connor, J. concurring)). A majority of the Court is in agreement that a gross statistical disparity alone may satisfy the *prima facie* standard. *See Hazelwood*, 433 U.S. at 307-08; *see also, Johnson*, 480 U.S. at 633 n.11 (opinion of Brennan joined by Marshall, Blackmun, Powell and Stevens, JJ.) (when there is sufficient evidence to meet the more stringent *prima facie* standard, be it statistical, nonstatistical, or a combination of the two, the employer is free to adopt an affirmative action plan) and at 649 (O'Connor, J., concurring), *cited in*, *U.S. v. San Francisco*, 696 F.Supp. at 1302.

Where, as in the instant case, promotions are made entirely from the lower ranks, the probative statistical comparison is between the percentage of minorities in each of the upper ranks and the percentage of minorities in the qualifying rank below. *U.S. v. San Francisco*, 696 F.Supp. at 1302-03. As discussed above, the City has shown a *prima facie* case of a violation of Title VII, and therefore has sufficiently produced evidence of past discrimination, such that a compelling government interest exists.

The City's plan is narrowly tailored to achieve racial balance. In determining whether race-based remedies are

narrowly tailored, several factors must be considered: necessity for the relief; efficacy of alternative remedies; flexibility and duration of the relief; waiver provisions; relationship of any numerical goals to the relevant labor market; and impact of relief on third parties. *United States v. Paradise*, 480 U.S. at 171.

The race-conscious measure is necessary to achieve the goals of the consent decree. Moreover, the plan is flexible in that it is not a quota and does not require the hiring of any person not qualified for the job. All candidates are considered qualified if they fall within a band under consideration. No member below the band will be chosen before someone within the band. Thus, the City may waive its affirmative action objectives if no minorities fall within the highest band.

Banding is more efficacious than alternative remedies, in that it does not require the expense and delay of abandoning the examinations and administering a new selection procedure. By its nature, the band is flexible in its selection, and will only be instituted for the life of the eligibility lists.

The plan does not force the Department to promote individuals solely because of their race. *Higgins*, 823 F.2d at 358. Rather, like the plan in *Bakke*, the City's revised proposal simply uses race as a "plus" factor in selecting officers for promotion.

The proposal does not use layoffs to achieve its goals. In *Wygant*, the Court discussed the peculiar harm inherent in the use of layoffs to remedy prior discrimination. *Wygant*, 106 S.Ct. at 1850-51. Layoffs were considered too intrusive a means of limiting discrimination, while hiring goals impose a diffuse burden. *Id.* As noted in *Higgins*, promotion guidelines are even less intrusive than hiring goals. 823 F.2d at 360.

For all of these reasons, we find that the City's proposal is lawful under the Fourteenth Amendment.

D. Criteria and Panel

At the court's direction, the parties have submitted banding proposals and responses for the court's consideration. After review and consideration of those proposals and responses, the court hereby declares that the City's proposed selection criteria are legally sound.

1. *The Panel*

The Chief of Police will select a panel of three persons and two alternates to make selections from within the relevant band range. The panel will be comprised of:

1) The Department's Affirmative Action Officer; and

2) Two police officers and two alternate police officers (holding a permanent rank of lieutenant or higher), all of whom accept the underlying premise of banding that all the officers they are reviewing are equally qualified, who are willing to apply all the selection criteria, and none of whom are residents of, or employed in the jurisdiction of the Department. The representation of minorities on the panel is encouraged.

2. *Selection Criteria*

Selections for promotions will be made by the Chief of Police based on the recommendations of the panel. The panel's review will consist of an evaluation of that candidate's personnel files, and departmental and OCC records. Each candidate will be allowed to inspect his or her relevant records prior to the panel's review. Candidates will have the opportunity to provide proof of any information erroneously omitted from the records, which would be relevant to the panel's recommendations. However, candidates will not be permitted to contest previous administrative decisions by the Department, the OCC or the Police Commission. If, after reviewing the records, the panel finds it necessary to verify the information contained in the records, it may question the candidate.

Each officer being considered has the option of making an oral presentation to and answering questions from the panel. The purpose of the presentation is to give officers the opportunity to show themselves in their best light, describe relevant experience or activities that may not appear in their personnel records, and discuss their skills. A topic inappropriate for discussion is the fairness of past disciplinary actions or any other negative material that appears in officers files.

The panel's deliberations shall be confidential. The panel's recommendations shall be made by majority vote. The panel's recommendations and the Chief's decisions shall be final, and no candidate may appeal therefrom.

The band should be implemented beginning at the 91st sergeant appointment and 53rd assistant inspector appointment, since the City has already made 90 sergeant appointments and 52 assistant inspector appointments under the assumption that those appointments would not later be disturbed.

The panel shall select candidates for promotion from within each band by considering the following criteria:

1) Professional conduct, including good conduct, the absence of disciplinary actions, and the absence of sustained citizen complaints;

2) Job-related performance and achievement;

3) Job-related education, training, experience and career development; and

4) The Department's affirmative action goals.

CONCLUSION

Good cause appearing, this Court hereby declares that the City's revised proposal to use banding in the selection of officers to the ranks of sergeant and assistant inspector is lawful under the Consent Decree entered in this action,

Title VII, and the Equal Protection Clause of the Fourteenth Amendment.

At the request of the City, the Q-60 lieutenant's examination, which had been scheduled for July, 1991, is continued until after the first fifteen sergeants are appointed under the banding proposal. The City is excused form all sanctions associated with this delay in giving the Q-60 examination and making the required Q-60 appointments. IT IS SO ORDERED.

DATED: August 21, 1991

/s/ Robert F. Peckham
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-73-0657 RFP
No. C-77-2284 RFP
(Consolidated)

OFFICERS FOR JUSTICE, *et al.*,
Plaintiffs,

v.

CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants,

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,
Intervenor.

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants.

ORDER RE: BANDING

[Filed June 6, 1991]

In this case, defendant City and County of San Francisco ("City") requests declaratory relief regarding a proposal to select appointments to certain promoted ranks

in the City's police department ("Department"), following two promotional examinations. The City proposes to appoint 160 officers in strict rank order of the scores on the examinations, and then switch to a "banding" method for selection of an additional 22 candidates. Race will be the determinative factor for selection within the "band" created for the purpose of making the additional appointments. Because race will thus be used as a sole criterion for selection of the appointees, this court must declare the proposal impermissible under the Equal Protection Clause of the Fourteenth Amendment.

INTRODUCTION

The litigation in this case dates back to 1973, when an organization of minority and female police officers called Officers for Justice ("OFJ"), along with eleven individual and four other organizations,[1] filed a class action lawsuit alleging employment discrimination in hiring, promotion and job assignments based on race and sex in the Department. The action charged the Department with having promulgated a widespread pattern and practice of racial and sexual employment discrimination, in violation of 42 U.S.C. § 1983, and sections of the United States and California Constitutions.[2]

In 1978, trial began on the discrimination issues remaining. Approximately two weeks after the beginning of trial, the trial was recessed and the parties negotiated

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[1] The other organizations were the National Association for the Advancement of Colored People (Western Region), League of United Latin American Citizens, Chinese for Affirmative Action, National Organization of Women.

[2] Shortly after the suit was filed, the San Francisco Police Officers Association ("POA"), was granted leave to intervene as a party defendant. In December 1977, the United States filed a separate action, alleging a pattern and practice of discrimination similar to that challenged in the original suit. The two actions were consolidated in January, 1978.

a proposed consent decree. The decree set forth various requirements and goals applicable to the City's recruitment, hiring and promotional practices in the Department. It provides for specific, definable and good faith efforts to be made by defendants to achieve certain goals for employment of women and minorities within specified periods of time. As a basic matter, the decree prohibits the City from using any examinations which have a disproportionately adverse impact against minorities or females, unless the examination is validated pursuant to the Uniform Guidelines on Employee Selection Procedures, 28 U.S.C. 50.14; Consent Decree ¶ 4.

On August 10, 1989, this court directed the City to administer examinations by December, 1989 for the ranks of sergeant (Q-50) and assistant inspector (Q-35). The Order also required the City to appoint 100 sergeants and 60 assistant inspectors from the results of these exams. Half of these appointments were due by June 30, 1990, and the remainder by July 31, 1990. The City administered the examinations for the ranks of Q-35 and Q-50 in November and December, 1989, respectively.

The examinations again resulted in adverse impact on minorities.[3] On June 30, 1990, the City complied with the requirements of the Court's August 10, 1989 order by making 50 temporary appointment to the rank of sergeant and 30 temporary appointments to the rank of assistant inspector. Because of the adverse impact and the anticipated challenges to the validity of the exams,

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[3] Under the "four-fifths" rule of the Uniform Guidelines on Employee Selection Procedures, adverse impact exists when the selection rate of minorities is less than 80 percent of the selection rate of nonminorities. 29 C.F.R. § 1607.5 (1990). If the City were to promote 100 persons to the rank of sergeant in strict rank order, the selection rate for minorities would be approximately 48 percent of the selection rate of nonminorities. Similarly, if the City were to appoint 60 inspectors in strict rank order, the "adverse impact ratio" of the pass rate of minorities to nonminorities would be fourteen percent. Hurley Decl., Exh. B, C.

the City sought an extension of the July 31 deadline until the controversy over a selection procedure was resolved. The City's obligations to make the remaining appointments were suspended for 60 days to permit the parties to negotiate proposals to use banding as an alternate selection procedure. Negotiations among the POA, OFJ and the City failed to produce agreement concerning the appropriate response to the adverse impact of the tests.

As a result of this impasse, the City has brought before the court this request to declare the legal validity of a proposed scoring procedure for promotion to certain ranks within the Department. The City proposes to appoint the 160 officers in strict rank order, pursuant to our August, 1989 Order, and then employ a "band" to appoint an additional 22 officers. The proposal permits an employer to treat examination scores that fall within a statistically determined range—a "band"—as substantially equivalent for purposes of the knowledge, skills and abilities measured by the examination. The City proposes to use banding for the additional appointments, in order to promote a higher ratio of minority officers based on the results of examinations for the positions of Q-35 Assistant Inspector and Q-50 Sergeant, than would have been promoted under a strict rank order system. The City's purpose is to reduce the adverse impact the examinations had on minority candidates.

Banding proceeds from the notion that an individual will not achieve an identical score on different administrations of the same examination. As a result of inevitable measurement error, employers who hire based on strict rank order do not always make the correct comparative choice. The smaller the difference between observed scores, the more likely it is that the score differences resulted from measurement error rather than true differences in skills and abilities for the job. The City argues that by applying statistically defined "bands" to actual test scores, the employer can tell, with a certain

degree of confidence, how large a difference between observed scores reliably represents differences in qualifications.

The band operates on the principle that for purposes of promotion, scores that fall within a certain fixed range should be treated as substantially equivalent. This fixed range is claimed to be psychometrically defensible, so that where scores are not separated from each other by a statistically significant difference, the scores are treated as identical for purposes of determining eligibility for promotion. In the instant case, the band range on a 100 point scale is approximately 4.00 points on the Q-35 examination, and 5.48 points on the Q-50 examination. The Q-35 band extends from a score of 66.282 to a score of 62.286 and encompasses 52 (out of 831) candidates. The Q-50 band extends from a score of 67.553 to a score of 62.339 and encompasses 71 (out of 747) candidates.

The type of "banding" that the City proposes to use here is the "sliding band" scoring method developed by Dr. James Outtz. Under the "sliding" band system, once the person who achieved the highest score within a certain band is selected, the band "slides" down and the next highest score serves as the reference point. The band would then extend from this next highest score to the score encompassed below by the width of the band. Thus, it is assured that no candidate may be passed over for someone below the band; that is, no candidate will lose their promotion in favor of one whose score is statistically significantly lower than theirs.[3]

The aspect of the City's banding proposal that the court focuses upon here, concerns the selection of candidates from the allegedly equally qualified pool within the band. The City's plan would result in selection of the

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[3] Despite the City's proposal to use a "sliding" band, under the terms of the proposal, which appoints only a limited number of candidates employing the banding method, the band never slides. *See* discussion, *infra*, at 7-8.

minority candidates from within the band first, before selecting nonminorities from within the same band. Theoretically, when no minorities remain within a given band, the highest scoring candidate would be selected, thus "sliding" the band down to encompass those candidates, possibly minority candidates, who scored within the band extending down from the next highest score. In other words, if minorities were situated "next in line" down the list of scores, the City would appoint the highest-ranking candidates in the band so that minority candidates could be included in the band. Thus, within each band, race is the exclusive selection factor.

The City's proposal to apply the banding method is limited to a relatively small portion of the sergeant and assistant inspector candidate pools. Out of the candidate pool for assistant inspectors of 831 persons, and a candidate pool for sergeants of 747 persons, the City proposes to make 100 sergeant and 60 assistant inspector appointments in rank order, in keeping with the City's obligations under this Court's August 19, 1989 Order. Next, the City would institute banding to create one band each for sergeants and assistant inspectors in order to appoint fifteen additional sergeants and seven additional assistant inspectors.

As a result of the limited nature of the City's proposal, the "sliding band" approach takes on a novel twist —it does not slide. Indeed, all of the proposed candidates would be selected from the first band, before the bands ever had a chance to deplete themselves of minorities, and begin to slide down the list. Of the fifteen proposed additional sergeants, fourteen minorities can be found within the first band. *See* Hurley Decl., Exh. D, n.2. Of the seven assistant inspectors proposed, six minorities would be selected from the first band. *Id.*, Exh. E, n.3. The City presents no definite plans concerning the future use of the eligibility list, or whether it will seek to use banding for future promotions to sergeant and assistant

inspector. Thus, after the City's proposed appointment of an additional twenty minorities and two nonminorities to the promoted ranks, the future use of the eligibility lists are unclear.

DISCUSSION

POA objects to the banding proposal on the grounds that it is statistically invalid and that the use of race as the sole selection criterion within the band is in violation of the consent decree signed by the parties. Moreover, both the POA and the United States argue that the proposal violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The court does not decide here the questions of whether the band is psychometrically sound, or whether the proposal is valid under Title VII and the consent decree. We decide today that the use of race as a sole selection criterion within each band cannot be allowed because such a method is in violation of the Equal Protection Clause.

Equal Protection Analysis: Race as a Sole Criterion

The POA and the United States contend that the City's plan violates the Equal Protection Clause of the Fourteenth Amendment. In this "reverse discrimination" case, it is the POA and the United States that must bear the burden of demonstrating that the rights of the nonminority police officers has been violated. *Wygant v. Jackson Board of Education*, 476 U.S. 269, 292 (1986) (O'Connor, J., concurring). We must find today that this burden has been met, and that the City's banding proposal fails to satisfy the rigorous equal protection requirements mandated by our Supreme Court.

In order to pass muster under the Equal Protection Clause, a race-based remedy must survive the most elevated scrutiny of the courts. "The burden of proof placed

upon the public employer to justify the enactment of an affirmative action remedial program . . . is a heavy one." *Long v. City of Saginaw*, 911 F.2d 1192, 1196 (6th Cir. 1990). The Supreme Court has adopted the strict scrutiny analysis of the plurality in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986) in testing race-conscious measures. *See City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality). The means chosen must be "narrowly tailored" to achieve a "compelling government interest." *Wygant*, 476 U.S. at 274.

Assuming for the moment that the City possesses a compelling government interest in remedying the lingering effects of past discrimination in the Department, we are compelled to find that, under the Supreme Court's interpretation of the equal protection clause, the City's plan is not sufficiently narrowly tailored to that compelling interest to pass constitutional muster.

The means chosen must "fit" the compelling government interest so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. *Richmond v. Croson*, 488 U.S. at 493. "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Wygant*, 476 U.S. at 280 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 537 (Stevens, J. dissenting)). In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and "that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In Re Griffiths*, 413 U.S. 717, 721-22 (1973) (footnotes omitted).

On the issue of whether the City's proposal is constitutionally allowable, we are *not* writing on a clean slate. Under Supreme Court and Ninth Circuit law, selection

for appointment solely on the basis of race cannot be a narrowly-tailored means of fulfilling a compelling government interest of either racial and ethnic diversity, or remedying the lingering effects of prior discrimination. In the seminal case of *University of California Regents v. Bakke*, 438 U.S. 265 (1978), the Supreme Court has made abundantly clear that race may not be used a sole criterion, insulating individuals from comparison with all other candidates for the available seats. *Id.* 438 U.S. at 317. In *Bakke*, the Court struck down the admissions plan of University of California at Davis, under which only members of certain minority races were considered for 16 of the 100 places in each year's class, whereas members of any race could qualify under the school's general admissions program for the other 84 places in the class. The Court found valid the Harvard College program, which did not set minority quotas, but rather, when viewing applicants who are academically qualified, viewed race as a positive factor among a number of criteria. *Id.* at 316. Rigid quotas that exclude from a specific number of appointments, regardless of the strength of criteria other than race, are not allowed. *Id.* at 319. Such programs disregard individual rights as guaranteed by the Fourteenth Amendment. *Id.* at 320. Race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it may not insulate the individual from comparison with all other candidates for the available seats.

The *Bakke* Court considered that the use of race as a sole criterion was not a necessary step to the attainment of a diverse student body. Although the compelling government interest in the instant case is not diversity, but rather the remedy of the harmful effects of discrimination in the Department's past, we must find that Justice Powell's reasoning nevertheless applies. In this circuit, whether remedying a lack of ethnic and racial diversity, or the pernicious effects of prior discrimination, the

rights of the individual under *Bakke* are not upheld where race is a sole selection criterion, excluding individuals from competition for available seats.

In *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989), white firefighter Higgins brought a reverse discrimination suit against the City of Vallejo for promoting Cooley, a black male, to the position of firefighter/engineer pursuant to the City's affirmative action plan. Under the City's plan, after taking a competitive examination, the top three qualified applicants were ranked according to their numerical test scores. The plan then allowed the city manager to consider race as one of any number of factors when deciding whom to appoint among the three certified applicants. *Id.* at 358. On the competitive written promotional examination administered for the position of firefighter/engineer, Higgins ranked first, with a score of 94.17 out of 100, and Cooley ranked third, with a score of 93.09. The City charter vested the power of appointment to the city manager, who appointed Cooley, consistent with the affirmative action plan.

The Ninth Circuit held that the appointment was valid under *Bakke*, finding that the affirmative action plan was similar to the "Harvard Plan" for university admissions approved by Justice Powell. *Id.* (citing *Bakke*, 438 U.S. at 316-19). Under the Harvard Plan "[w]hen the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor." *Bakke*, 438 U.S. at 316. As in *Bakke*, the Ninth Circuit decided, the plan in the City of Vallejo did "not force the city manager to promote individuals solely because of their race." *Higgins*, 823 F.2d at 358. By using race as a "plus" factor in this way, the program is "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant," and places them

"on the same footing for consideration, although not necessarily according them the same weight. . . ." *Id.* (quoting *Bakke* 438 U.S. at 317-18).

As noted above, the government's interest in using race as a selection criterion in *Bakke* focused upon the racial and ethnic diversity of the student population. However, the Ninth Circuit indicated that the promotion of individuals based solely on their race would have been impermissible, even where, as in the instant case, the government has a compelling interest in remedying past discrimination. Following this precedent, this court is bound to determine that in this circuit, using race as a sole selection criterion to promote individuals from a pool of qualified applicants is an impermissible use of race under the equal protection clause of the Fourteenth Amendment. For this reason, the City's plan cannot be approved. Under both *Bakke* and *Higgins*, only use of race as a "plus" factor would pass constitutional muster.

CONCLUSION

The concept of banding in various forms is a well-recognized way to utilize test results for appointment of candidates. *See e.g., Bridgeport Guardians v. City of Bridgeport*, 1991 U.S. App. LEXIS 10852 (May 28, 1991). The permissibility of banding itself, however, cannot mask the fact that under *Bakke* and *Higgins*, exclusion solely on the basis of race is constitutionally impermissible. Race may be used as a positive factor, but only in conjunction with other considered criteria. Since the City's banding proposal employs race as a sole selection criterion, this court cannot declare it permissible under the Equal Protection Clause.

The court suggests that the parties meet and confer in light of the foregoing, and consider submitting another proposal to this court. Recognizing the urgency of completing the promotional appointments in the Department,

the court sets this matter down for a telephone status conference on Wednesday, June 12, 1991 at 10:00 a.m. Counsel will inform the court of the person to be contacted for the telephone status conference, and the number at which they may be reached.

IT IS SO ORDERED.

Dated: June 6, 1991

/s/ Robert F. Peckham
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-73-0657 RFP

and

No. C-77-2884 RFP
(Consolidated)

THE OFFICERS FOR JUSTICE, *et al.*,
Plaintiffs,

vs.

THE CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants.

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,
Intervenor.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants.

CONSENT DECREE

[Filed March 30, 1979]

The plaintiffs Officers for Justice, et al., filed their Complaint in this action on April 23, 1973 (amended on

June 30, 1977), against the Civil Service Commission of the City and County of San Francisco, alleging that the defendants are engaged in a pattern or practice of discrimination in employment on the basis of race, sex and national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub.L. 92-261, March 24, 1972); 42 U.S.C. Section 1981 and 42 U.S.C. Section 1983. The plaintiffs have, during the course of this litigation, introduced substantial evidence of intentional discrimination by the defendants. This Court has issued preliminary orders finding the defendants' selection practices and procedures for entry-level and Sergeant positions to be discriminatory and in violation of federal law. These decisions are to be found at 371 F.Supp. 1328 (N.D.Cal.1973), 395 F.Supp. 378 (N.D.Cal.1975), 14 EPD 7548 (N.D.Cal. 1977), and 14 EPD 7549 (N.D.Cal.1977), and, further the Court on September 22, 1978 granted plaintiff United States partial Summary Judgment with respect to certain of defendants' examination procedures.

No findings of any kind have been issued by the Court concerning the validity of the 1974 audio-visual entry-level selection device. Defendants, by entering into this Consent Decree, do not admit thereby that said examination in any way violates federal law, rule or regulation.

Prior to a final hearing on the merits of this litigation, the plaintiff United States of America filed its Complaint against the City and County of San Francisco, alleging that the defendants are engaged in a pattern or practice of discrimination in employment on the basis of race, sex and national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub.L. 92-261, March 24, 1972), the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. Section 3701, as amended, and the State and Local Fiscal

Assistance Act of 1972, 31 U.S.C. Sections 1221, *et seq.* The two cases have been consolidated.

The parties wish to avoid the delay and expense of contested litigation and desire to insure that any disadvantage to minorities and females that may have resulted from past hiring and promotional practices be remedied so that equal employment opportunity will be provided to all.

The Court has jurisdiction over the parties and subject matter of this action.

The parties, by agreeing to the issuance of this order, waive a hearing and findings of fact and conclusions of law on all issues raised by the complaints, and the parties have mutually agreed to the entry of this Consent Decree. Defendants, by entering into this Consent Decree, do not thereby admit any violations of law, rule or regulation with respect to the allegations made by plaintiffs, private or governmental, in their complaints. By entering into this Consent Decree, defendants do not concede the legal and constitutional validity of the Court's findings of discrimination. Defendants admit to no failure to practice affirmative action.

The Court having been fully advised and informed of the facts and circumstances, and good cause appearing therefor,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

I

EFFECT OF THE CONSENT DECREE

This Decree is entered into as a settlement of an existing dispute between plaintiffs, both private and governmental, and defendants as to appropriate and valid procedures for the hiring and promotion of police officers for the City and County of San Francisco. It also pro-

vides for specific, definable and good faith efforts to be made by defendants to achieve certain goals for employment of women and minorities as herein defined, within specified periods of time. This Consent Decree satisfies and resolves all claims of the private plaintiffs and the class they represent, and of plaintiff United States, of racial, ethnic, national origin and sex discrimination with respect to those matters set forth in the complaints and the previous orders of this Court.

This Decree also enjoins the Law Enforcement Assistance Administration from suspending financial assistance to the San Francisco Police Department pursuant to 42 U.S.C. Section 3766(c)(2)(E) and the Complaint filed by the United States of America on December 22, 1977.

Both private plaintiffs and the class they represent, and plaintiff United States, shall seek no further relief for the acts, practices or omissions alleged in the complaints save to enforce the provisions of this Decree, thereby waiving the right to seek further relief.

Plaintiffs, both private and governmental, agree that this Consent Decree is fully binding individually and on the class they represent. Defendants agree that this Consent Decree is fully binding on each of them, each of their officers, agents, employees and successors, and all other persons acting in concert with them who have notice of this Decree.

II

DEFINITIONS

For the purposes of this Consent Decree, the following terms shall be defined as follows:

"Plaintiffs"—The named parties plaintiff of both *Officers for Justice, et al. v. Civil Service Commission, et al.*, No. C-73-0657 RFP and the class they represent, and *United States of America v. The City and County of San Francisco*, No. C-77-2884 RFP.

"Defendants" or "City"—The named parties defendant in both of the above-referenced actions, except for intervenor Police Officers Association.

"Minorities"—For purposes of this Decree, the term "minority" shall include only those persons within the groups "Black," "Hispanic" and "Asian or Pacific Area people" as defined at 28 C.F.R. 42.402(e).

"Private Organizational Plaintiffs"—The named organizational plaintiffs of *Officers for Justice, et al. v. Civil Service Commission, et al.*, specifically the Officers for Justice, the National Organization for Women, Chinese for Affirmative Action, the League of United Latin American Citizens, and the National Association for the Advancement of Colored People.

"Parties"—The "plaintiffs" and "defendants" as defined above, and defendant-intervenor Police Officers Association.

III

CLASS CERTIFICATION

Plaintiffs brought this action as a class action seeking to represent various categories of persons for purposes of securing injunctive and declaratory relief, as well as for the recovery of back pay, compensatory and punitive damages. In its order of May 12, 1977, the Court certified the plaintiff class for purposes of injunctive and declaratory relief. For purposes of this Decree, the Court hereby adopts the class description set forth in that order with modifications as follows:

There shall be two plaintiff subclasses. Subclass (a) shall consist of all Blacks, Hispanics, and Asians (including Chinese, Filipinos, Japanese, Korean and other Pacific Area people), who:

(a) completed the entry level Q-2 or Q-20 examination administered by defendants during the years 1969-72, but failed or placed so low that there was

no likelihood of their permanent appointment, or who were disqualified because of height;

(b) applied for the 1974 Q-2 examination, but were discouraged or dissuaded from completing the examination process as a result of alleged discriminatory practices of defendants;

(c) completed the 1974 Q-2 examination, but failed or placed so low that there is no likelihood of their permanent appointment;

(d) have been discriminated against in any temporary or permanent promotions or other benefits by their lack of seniority in the police department which is the cumulative effect of discrimination at the entry level;

(e) completed the 1971 Q-50, or 1972 Q-35 promotional examinations, but failed or placed so low that they did not receive appointment;

(f) failed the 1976 Q-35 or Q-50 promotional examinations, or would not have received appointment but for the provisions of this Decree in paragraph 10 (a);

Subclass (b) shall be all women who:

(a) took the last Q-20 examination and did not receive appointment from the eligible list;

(b) applied for the 1974 Q-2 examination, but were discouraged or dissuaded from completing the examination process as a result of discriminatory practice of defendants;

(c) completed the 1974 Q-2 written examination, but did not complete the process or were disqualified on the basis of the physical agility examination;

(d) were appointed to the position of Q-2 patrol officer as a result of this Court's order of May 5, 1975, 395 F.Supp. 378;

(e) were Q-20 policewomen who were precluded, because of their sex, from eligibility for the Q-50 examination process until 1976.

This action was brought, insofar as is relevant to this section of the Decree, on the basis of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.*, as amended, and 42 U.S.C. Sections 1981, 1983. For purposes of this settlement alone, and for no other purposes, the Court is satisfied that the above class should be and hereby is certified as proper under Federal Rule of Civil Procedure 23(b)(2) for injunctive, declaratory and back pay relief, and under Federal Rule of Civil Procedure 23(b)(3) for purposes of recovery of compensatory or punitive damages, if any.

IV

GENERAL

1. Defendants are compelled by law and by entering into this Consent Decree acknowledge their obligation to, and agree that they shall, refrain from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or potential applicant for employment with, the San Francisco Police Department because of such individual's race, sex or national origin. Defendants in addition acknowledge their duty under law to, and agree that they shall, refrain from discriminating at any time on the basis of race, sex or national origin in hiring, promotion, upgrading, training, assignment or discharge or otherwise discriminating against an individual employee or applicant for employment with respect to compensation, terms and conditions or privileges of employment because of such individual's race, sex or national origin. The City shall take reasonable steps to assure that no member of the police department interferes with the enforcement of this Decree by any means, including the harassment or intimidation of minority or female of-

ficers protected by the terms of this Decree. The acknowledgments set forth in this paragraph do not create a right or rights in any person or group of persons to seek relief under this Decree for defendants' failure to comply with their general legal obligations as described in this paragraph, except for conduct which constitutes a pattern or practice of unlawful discrimination on the basis of race, sex or national origin.

2. In the event the entry of this Consent Decree generates, either through intervention or separate, collateral lawsuits, attacks on the appropriateness or sufficiency of any of the provisions contained herein, to include actions claiming entitlement to damages against the City as a result of the ordering of any of the affirmative relief contained in this Decree, the parties hereto agree and warrant that they shall defend the lawfulness of any provision or provisions so attacked. If any such collateral lawsuit arises in state court against the City, it shall seek to remove such action to the Federal District Court.

V

RECRUITMENT

3. The City shall continue to develop and reassess its present affirmative recruitment program designed to inform minorities and women of job opportunities with the San Francisco Police Department. The City is obligated to engage in such recruitment practices as may be reasonably necessary to attract sufficient qualified minorities and women to meet the goals set forth in paragraph 9a below. Specific recruitment programs shall be designed with the participation and support of the parties, as specified in paragraph 11 below. The recruitment program shall include contacts with area high schools, technical and vocational schools, colleges, and organizations which have traditionally expressed an interest in providing minority and female applicants or which indicate such interest in the future, and informing them of employment

opportunities for City residents. In addition, where appropriate, advertising of employment opportunities shall be placed in radio stations and other mass media primarily directed to Black, Hispanic, Asian and female audiences for the purpose of emphasizing to minorities and women the availability of employment positions.

VI

SELECTION PROCEDURES

4. The City shall, except as provided herein, make no further use of tests or other selection qualifications, standards or procedures for hiring or promotion within the San Francisco Police Department the use of which has been enjoined by previous orders of this Court, or any tests, qualifications, standards or other procedures within said Department which have a disproportionately adverse impact against minorities or females, unless and until such standards have been shown to be valid, pursuant to the *Uniform Guidelines on Employee Selection Procedures*, 43 Fed.Reg. 38290, August 25, 1978, or any superceding federal guidelines. All evidence of validity of proposed tests, standards or selection procedures to be used subsequent to the entry of this Decree shall be submitted to the parties' counsel for review and comment at least sixty days prior to their implementation. In order to meet the hiring goals for females set forth in paragraph 9 below, the City will establish physical agility scores utilizing the same T-score for women vis-a-vis women as the T-score for men vis-a-vis men. The City shall establish eligibility lists on the basis of examinations, and make selections from those lists, in a manner consistent with its obligation to expedite and facilitate the achievement of all goals set forth in this Decree.

5. The City shall require that all applicants for police officer be *bona fide* residents of the City and County of San Francisco at the time of their application and appointment, with residence thereafter to be maintained as required by City and State law.

6. The following written notice shall be given to all persons who take an examination for hiring or promotion within the department for the duration of this Decree:

> This examination and the selection procedures to follow are the subject matter of a Consent Decrees on behalf of minorities and women entered in the United States District Court for the Northern District of California and are matters which are subject to the scrutiny of that Court. The Consent Decree is on file and available for review at the Clerk's office of the Federal District Court, 450 Golden Gate Avenue, as Civil Actions No. C-73-657 RFP and No. 77-2884 RFP.

VII

ASSIGNMENT AND DISCIPLINE

7. The City is compelled by law, and by entering into this Consent Decree acknowledges its obligation to, and agrees that it shall, refrain from discriminating at any time on the basis of race, sex or national origin in assignments or discipline within the San Francisco Police Department. Disciplinary reporting shall be made as provided in paragraph 14g below and records of all assignments shall be made available to the auditor upon request, as herein provided. The acknowledgments set forth in this paragraph do not create a right or rights in any person or group of persons to seek relief under this Decree for defendants' failure to comply with their general legal obligations as described in this paragraph, except for conduct which constitutes a pattern or practice of unlawful discrimination on the basis of race, sex or national origin.

VIII

GOALS

8. In order to eradicate the present effects of past hiring and promotion practices with respect to minorities and women, the City shall adopt and seek to achieve as a

long-term goal the recruitment, appointment and promotion of qualified minorities and women in sufficient numbers so as to increase substantially the minority and female composition of the San Francisco Police Department, so that it more nearly reflects the racial, ethnic and sexual composition of the relevant labor force of the City and County of San Francisco. For the purposes of this Decree, the long-term goal of defendants shall be to raise the minority representation to 45 percent of the sworn personnel of the San Francisco Police Department.

No specific numerical long term goal is set with respect to the representation of women on the sworn force, it being understood by the parties that equality with the qualified female labor force percentage may not be reached within the term of this Decree. The parties further understand that the interim goals for women established in paragraph 9 herein, while the only enforceable goals in this Decree for women, are minimum goals and it is expected that active and effective recruitment and training efforts by defendants may result in the appointment of significantly higher proportions of qualified female applicants. On attainment of the long term minority goal prior to expiration of this Decree and upon motion of defendants, the Court shall grant the City relief from compliance with the interim minority hiring procedures established in paragraph 9 hereof. All efforts, goals and objectives referred to herein require good faith effort on the part of the City.

9. *Hiring.*

The hiring objectives set forth herein are goals not quotas, and as such are subject to the availability of qualified applicants. Nothing herein shall be interpreted to require the hiring or promotion of unqualified persons, it being understood that the use of a selection procedure or examination shall not justify failure to meet a goal set out herein unless the procedure or examination is

shown to be valid under the Uniform Guidelines on Employee Selection Procedures, *supra*.

a. To insure as quickly as practicable the attainment of its long-term goal, the City shall, subject to the availability of qualified minority and female applicants, adopt and seek to achieve the following interim objective:

In filing future vacancies at the entry level of the San Francisco Police Department, the City shall adopt and seek to achieve the goal of appointing sufficient minorities and women each year so that at least 50 percent of vacancies are filled by minorities and 20 percent of vacancies are filled by women, until the long-range goal of this Decree has been achieved, or until the expiration of this Decree, whichever occurs first. Minority women shall be considered to satisfy both the minority and female goals above. For purposes of eligibility list E-91 only, the goal for females shall be 20 percent of available vacancies plus 30 women over the life of said list, with the goal to revert to 20 percent for all lists thereafter during the pendency of this Decree.

b. Because there may be persons within the City and County of San Francisco who are disadvantaged by an English language disability, especially in the Chinese community, the City agrees to adopt and seek to achieve as a long-term objective the appointment of persons bilingual in Chinese to the department so that the proportion of officers bilingual in Chinese in the San Francisco Police Department more nearly reflects the proportion of non-English speaking Chinese persons in the City's total population. In addition, the agreement entered into between the San Francisco Police Department and the Law Enforcement Assistance Administration on December 28, 1977, to resolve a preliminary finding of noncompliance with the Safe Streets Act issued by LEAA on November 16, 1977, is attached hereto as Exhibit A and incorporated herein by reference. The City shall undertake a special recruitment and hiring program, the objective of

which will be specifically to secure bilingual Chinese-speaking officers for appointment to the department.

Pursuant to this requirement, the City shall adopt and seek to achieve a goal of appointing from the next Q-2 eligible list adopted after May, 1979, nine officers bilingual in Chinese, subject to their availability on said eligible list. In the event any of the nine persons so appointed are minorities, they shall not be counted to satisfy the goals to which the City agrees in paragraph 9(a) above. In addition, the City shall adopt and seek to achieve a goal of appointing twenty officers bilingual in Chinese, subject to the availability of such persons, by January 1, 1984, from available Q-2 eligible lists. The City agrees at all times during the period of this Decree to be responsive to the need for bilingual police officers beyond that set forth in this Consent Decree and bi-annually assess the delivery of police services to the minority, language-disadvantaged communities of San Francisco.

c. Only those persons who successfully complete the academy and field training programs shall be counted for purposes of determining compliance with the goals set forth in paragraph 9a above. For the purposes of this Decree, the academy and field training program shall be deemed to be eight months in duration.

10. *Promotion.* To insure as quickly as practicable the attainment of its long-range promotional goals, the City agrees to the following:

a. *Sergeant and Assistant Inspector*:

(1) The City agrees that it shall by August 1, 1981, increase the number of sworn officers in the San Francisco Police Department to the full budgeted strength of 1971 persons, and shall maintain at least that level of staffing until at least August 1, 1984.

(2) The department will by January 1, 1981, offer promotion to the ranks of Sergeant or Assistant Inspector

to all officers in rank order on the respective 1976 informational rosters of candidates eligible for promotion to those positions. Those persons holding temporary appointments to those ranks as of December 1, 1978, shall be retained in said status until their permanent appointment. Seniority shall accrue in rank order to persons appointed pursuant to this provision as of the date of permanent appointment.

(3) After appointments to Sergeant or Assistant Inspector in accordance with subparagraph 10a(2) above, the City shall, subject to the availability of qualified minority and female applicants, adopt and seek to achieve an annual goal of selecting minorities and women for promotion to permanent Sergeant and Assistant Inspector positions in proportion to their representation in the qualified applicant pool for each examination.

(4) In view of the fact that the rate of appointments in the past ten years for the rank of Sergeant has been twenty-five persons annually and fifteen persons annually for the rank of Assistant Inspector, the City shall maintain at least this rate of appointment in said ranks from and after August 1, 1981, through the termination date of this decree.

b. *Lieutenant and Captain*:

(1) The City will administer the next Lieutenant examination when all the minorities and women promoted to Sergeant in accordance with paragraph 10a(2) above are eligible to compete for promotion to Lieutenant.

(2) Subject to the availability of qualified minority and female candidates, the City shall adopt and seek to achieve the annual goal of selecting minorities and women for promotion to Lieutenant and Captain in proportion to their representation in the qualified applicant pool for each examination.

(3) The City shall limit to two years the life of the eligibility lists for the next two Captain examinations administered following entry of this Decree.

(4) The City shall conduct an extensive review of the selection procedures for the positions of Lieutenant and Captain to ensure their job relatedness and to attempt to minimize or eliminate adverse impact on minorities and women.

(5) At least 120 days in advance of the administration of each examination for Lieutenant and Captain, the City shall notify counsel for the parties of the nature and scope of the anticipated examination, the procedure by which it was developed, and expected means of scoring and ranking applicants. Thereafter, the City shall notify counsel for the parties of the results, by race, sex and national origin, for each stage of the examination process within ten days of its administration if practicable and at least 60 days before any eligibility list is formally adopted. If any of the parties wish to object to the examination process or any portion thereof, they shall notify the other parties in writing within 30 days of the receipt of the information set forth above of the nature of the objections and the parties shall meet promptly to attempt to resolve the objection. Failing resolution in this manner, any party may move the Court for resolution.

(6) In view of the fact that the rate of appointments in the past ten years for the ranks of Lieutenant and Captain have averaged on an annual basis no less than twelve persons and four persons respectively, the City shall appoint between August 1, 1985 and the termination date of this decree in the aggregate forty-eight persons to the rank of Lieutenant and sixteen persons to the rank of Captain. This commitment shall be measured over this four-year period and not on an annual or other basis.

c. *Nonpermanent Appointments.* In the absence of civil service eligible lists, future nonpermanent appointments from the next lower rank in the uniformed force shall be based on experience (which may include seniority), demonstrated performance, and potential to fulfill

the requirements of the position to which the appointee will be assigned but shall be made without regard to seniority as a sole criterion and, consistent with the foregoing, reasonable efforts shall be made to give leadership experience to minorities and women.

d. In order for the City to construct promotional examinations that appropriately sample the knowledges, skills and abilities esential to the particular promotive rank or position, said examinations need not be entirely of a written character, nor shall test content be necessarily related to material taken from a bibliography promulgated within the police department at least six months prior to the administration of the examination, and the examination components shall be weighted as is appropriate to the rank or position for which the examination is held. Said examinations shall consist of a combination of written and oral components, and shall be job-related.

No service credits on promotional examinations or other service requirements as a prerequisite to competing in said examinations during the pendency of this Decree shall be granted or imposed, except as follows:

(1) Any sworn member of the police department who has served in the department not less than three years shall be eligible to participate in a competitive examination for either the rank of Sergeant or Assistant Inspector.

(2) a. Any sworn member of the police department who has held a permanent appointment in the rank of Sergeant for not less than two years shall be eligible to participate in a competitive examination for the rank of Lieutenant.

b. On a one-time only basis, those persons promoted to Sergeant pursuant to paragraph 10a(2) above shall be eligible to participate in a competitive examination for the rank of Lieutenant after

holding a permanent appointment in the rank of Sergeant for not less than eighteen months. This exception does not and will not apply to any other persons nor to any other examinations for Lieutenant save for that referred to in paragraph 10b(1) above.

(3) Any sworn member of the police department who has held a permanent appointment in the rank of Lieutenant for not less than two years shall be eligible to participate in a competitive examination for the rank of Captain.

(4) Five years after the entry of this Consent Decree, the City may adopt a policy of giving service credits to applicants for promotion, worth up to a maximum of five percent of a candidate's standing in the competitive process, by allowing one and two-thirds percent credit in the process as a whole for each year that a candidate has held a permanent appointment in the rank from which promotion is to be made up to a maximum of three years per candidate.

The Chief of Police shall have power, subject to the approval of the Police Commission, to appoint any sworn member holding a permanent appointment in the rank of Lieutenant or above to any non-civil service rank as created by the Police Commission pursuant to the provision of Charter Section 3.530.

SPECIFIC RELIEF

11. *Recruitment, Training and Promotion of Minorities and Women.*

a. In order to achieve the goals set forth herein, the City shall develop a full scale program specifically designed to recruit and train minorities and women for hiring, and prepare them for promotion, in the Police

Department. This program shall be consistent with the recruitment program approved and ordered by the Court on November 21, 1978. The program shall contain both a specific and comprehensive two year plan and at least a specific outline of a long-range plan. The program shall include steps designed to ensure that the parties are fully involved at all levels of planning. The program shall also designate specific roles for active participation by the parties. Each program will include participation of qualified persons, including the parties wherever possible and appropriate. In devising this program, the City shall take into account the important role that minorities and women, and minority and women's organizations, must play in implementing the program and ensuring that the goals set forth in this Decree are fully met.

b. The Defendants shall adopt a program for the development of Chinese bilingual skills. It shall be administered by entities independent of the Police or Civil Service Commisions, subject to approval of the Auditor-Monitor, and the parties and shall be subject to appropriate audits. Available funds shall be used to train officers, without regard to race, in at least some language skills in Chinese, and to upgrade the skills of those who already speak some Chinese.

12. *Auditor-Montor*: The Defendants shall assume reasonable costs, including salary, fringe benefits, paraprofessional and secretary services, office space, duplicating, travel, postage and other related costs, for an Auditor-Monitor, regarding compliance with this Decree. The Auditor-Monitor, hereinafter Auditor, shall be employed as is necessary to discharge fully and expeditiously the duties set forth herein until termination of this Decree. The Auditor's duties shall include but not be limited to:

a. Preparing the reports to the Court and the parties required by paragraph 14 below;

b. Administering the $500,000.00 Fund, described in paragraph 13 below, in order to ensure that recruitment,

training, testing and promotions are proceeding in an appropriate fashion consistent with the goals and objectives of this Decree;

c. Assuring that assignments and disciplinary proceedings are free of discrimination on the basis of race, sex or national origin;

d. Making a determination of the race or national origin of candidates for appointment in accordance with the definitions adopted in Part II of this Decree, subject to objection by the parties hereto;

e. Verifying that all data submitted by the City to the parties and the Court pursuant to this Decree are complete and accurate. Pursuant thereto, the Auditor shall have full and complete access to all data available to the City regarding the above matter and shall have the right to make appropriate requests for the gathering and compilation of additional data necessary to accomplish the goals and objectives of this Decree. The Auditor shall also have full and complete access to all personnel who could be helpful in effectuating the goals and objectives set forth herein; and,

f. Any and all documents, records or other material submitted to the Auditor as provided herein subject to a claim of privilege under state or federal law shall be deemed confidential and treated as such by the Auditor and shall not be subject to public disclosure absent an order of the Court.

The Auditor, after consultation with the parties and subject to approval of the parties to this Decree, shall review and approve the City's plans to achieve the goals and objectives set forth in this Decree. With continuing appropriate consultation with said parties, the Auditor shall determine those recruitment, testing, professional upgrading, leadership and promotional programs to be implemented from the Fund, and give financial approval to those programs. Such programs shall be solicited from

the City and the other parties and other qualified organizations. Any unresolved disputes between the Auditor and said parties shall be submitted, upon appropriate notice, to the Court for resolution. The Auditor shall submit quarterly reports to the Court and said parties regarding the nature and amount of funds disbursed from the $500,000.00 Fund.

The experience and professional stature of the Auditor shall be commensurate with these duties, as shall be his or her salary. The Auditor shall be selected by the Court from among persons jointly recommended by the parties to this Decree or by the Court itself subject to approval of the parties to this Decree.

13. *Monetary Relief*:

The parties to this Decree have agreed that the aggregate monetary relief in this case shall be $900,000, $400,000 of which shall go for back pay and other damages as set forth in paragraph 13(b) below. The remainder of this sum ($500,000) shall be deposited with the Treasurer of the City and County of San Francisco within 45 days of final approval of the Consent Decree in a special interest bearing account with interest accruing to the Fund, said sum to be used to fund the goals and objectives of this Decree. Primary use of this fund shall be for recruitment, testing, training, and professional upgrading and leadership opportunities for minorities and women. The purpose of this fund shall be to initiate programs as part of the City's obligation in this Decree, it being understood that the City has the continuing obligation to provide monies reasonably necessary to meet its responsibilities herein. Upon receipt of a voucher from the Auditor, the Controller of the City and County of San Francisco shall disperse from this Fund sums in accordance with the procedures set forth in paragraph 12. All disbursements shall be in accordance with generally accepted accounting principles, subject to audit, and shall be described in the quarterly reports to be submitted to the parties and the Court.

a. *Master.* Defendants shall assume reasonable costs, including salaries, fringe benefits, para-professional and secretarial services, office space, duplicating, travel, postage and other related costs for a master regarding distribution of the monetary relief under this Consent Decree. The master shall be selected with the approval of the Court from names jointly recommended by the parties to this Decree, or shall be selected independently by the Court. The master shall be employed as is necessary to discharge fully and expeditiously the duties set forth herein. The master shall review and approve a plan for the distribution of monetary relief to the class which shall be submitted by the parties to this Decree, subject to final approval of the Court. The master shall also review and approve each individual claim for back pay, based upon an appropriate showing that the individual qualifies for receipt of monetary compensation under the proposed categories submitted by the parties to this Decree (Exhibit B), and shall distribute all payments to claimants. The master shall be provided any and all information necessary to review and approve the proposals submitted by the parties hereto, as well as to review and approve the individual claims submitted by class members.

b. *Monetary relief.* Subject to the provisions of paragraph 13(c) below, monetary relief under this Decree shall be distributed within the limits set forth below:

Back Pay for Class Members: The master shall be authorized to award to individual class members subject to proof in accordance wtih the standards set forth in the attached Exhibit B hereto up to $3,720 for back pay relief, which shall satisfy the entire claim of each individual class member against the Defendants, for back pay and any other damages under Title VII and 42 U.S.C. Sections 1981, 1983, and shall make claimant whole. There shall be a fund available for such distribution in the sum of $400,000, subject to the conditions in paragraph 23 below.

c. *Plan for Distribution.* Subject to the monetary limits set forth in paragraph 13(b) above, distribution of monetary relief shall be made by the master in accordance with qualification categories and monetary limitations set forth in Exhibit B hereto. With respect to Exhibit B categories 1(b) and 2(b), no person who qualifies for a payment in those subclasses shall in any event receive more than the maximum individual amount provided or a claimant's pro rata share of the fixed total amount shown on Exhibit B as allocated to that subclass, whichever is greater. With respect to the remaining subclass, the total amount of money allocated for payment to each subclass shall be determined by the master upon joint recommendation of the parties to this Decree after the number of claimants has been established so that the allocations among these subclasses results in the maximum proportionate recovery (subject to the established maximum individual limits) to the maximum number of claimants.

When the master is satisfied that after reasonable notice all possible outstanding claims have been made, any remaining funds which have not been distributed to any of the above designated parties shall revert to the fund described more fully in paragraph 13.

d. All persons making claim for monetary relief herein shall execute a release in the form attached as Exhibit C as a condition of payment.

X

REPORTING

14. Within thirty days of the entry of this Decree, and within thirty days of the last day of each calendar quarter for the duration of this Decree, the City shall submit to counsel for the parties a report or computer printout containing the following information:

a. A summary by race, national origin and sex of the number of persons in each rank at the end of the reporting

period, including the number of such persons hired and/or promoted to such rank and leaving such rank during the reporting period voluntarily or involuntarily. The report filed thirty days after entry of the Decree need include only such a summary of persons in each rank as of the date of the Decree.

b. A list identifying all sworn members of the Police Department by name, rank and unit of the department, and (except for the first report) identifying all such persons who were either appointed or promoted during the quarterly reporting period together with their appointment or promotion date, and identifying those who during the quarterly reporting period voluntarily or involuntarily left the employment of the department and the reasons therefor.

c. A list of the persons certified for appointment, appointed, or promoted to each sworn position in the department in accordance with paragraphs 9 and 10 above, including each person's position on any eligibility list. With respect to applicants and new hires, the City shall make available to counsel for the United States upon request each person's home address and telephone number. Counsel for the United States agrees to keep such information confidential in accordance with the protective order previously entered in this litigation.

d. A list of individuals who failed to complete academy training, during the preceding quarter, including the reasons for the termination, voluntary or involuntary, of each such candidate.

e. A list of patrol officers who complete the probationary period, and for each probationary patrol officer who is dismissed or no longer a probationary officer, the reasons therefor.

f. A list of persons who applied for each sworn position in the department, identifying the person actually tested, the persons who passed each component of the

examination and the scores reported for each component, and the persons who passed each complete examination.

Each list described in subparagraphs b through f above shall identify each individual by name, rank, social security number, race, sex, and national origin. The City shall also submit a copy of any computer tapes used to prepare the reports required by this paragraph 14, if requested by plaintiff United States.

g. A list of individuals against whom any disciplinary action was initiated by formal charge of the Chief of Police, the basis for such action, the persons actually disciplined, the disposition of each disciplinary action, and if sustained, the extent of the penalty or punishment.

15. The City shall provide counsel for the parties a copy of each eligibility list for hiring or promotion to any rank in the department at least thirty days in advance of the list's official posting or publication.

Each list so provided shall be identified by race, sex, and national origin.

XI

RECORD KEEPING

16. The City shall retain all records until further order of this Court relating to the recruitment, selection, appointment, promotion, training, assignment and discipline of persons for sworn officer positions in the Police Department, including:

a. all applications identified by race, sex and national origin;

b. all examinations administered including dates thereof and the scores of each applicant, identified by race, sex and national origin, on each component of the exam;

c. eligibility lists and appointments, identified by race, sex and national origin;

d. training and other employee evaluations.

Counsel for the parties shall have the right to inspect and/or copy for their use in connection with enforcement of this Decree any or all of the records described above, upon reasonable notice to the City subject to appropriate protective order. Counsel for the parties may request inspection or copying of other records for good cause shown upon application to the Court.

XII

MISCELLANEOUS

17. *Attorneys' Fees.* The City shall pay counsel for plaintiffs OFJ, et al., attorneys' fees in an amount no less than $238,700 and no more than $385,000 in settlement of all claims by said counsel for attorneys' fees from the commencement of this action through the expiration of this Decree, subject to the conditions in paragraph 23 below. The precise amount of the attorneys' fees to be paid shall be determined by the United States Magistrate after a hearing on the question. This amount shall be credited for any interim attorneys' fees ordered by the Court and paid by the City, with any interim fees to be paid wtihin ninety days of the final approval of this Decree. These attorneys' fees shall also compensate counsel for plaintiffs OFJ, et al., for all work to be performed during the pendency of this Decree so long as the Court finds that the conduct of the City is in good faith.

18. If any provision of this Decree causes as a result unintended by all the parties or an ambiguous interpretation, the aggrieved party shall notify the other parties by mail of the unintended result or ambiguous interpretation. The parties shall have 30 days after the date of such letter to resolve the problem. If the parties are unable to reach agreement within such 30 days, the issue may be submitted to the Court for resolution.

19. In the event any provision of this Decree is held unlawful by a court, all other provisions of this Decree

shall remain in effect and only the rights and/or obligations established in the voided provision shall be extinguished.

20. This Decree shall continue in full force and effect for a period of ten years from and after the date of final approval hereof by the Court. The Decree shall terminate upon filing of an order of dismissal with prejudice by defendants at any time after the expiration of this ten year period, unless plaintiffs show good cause upon motion served and filed prior to termination why the Court's jurisdiction should be continued. During the effective period of this Decree, the Court shall have continuing jurisdiction for the purpose of effectuating the purposes and terms of said Decree and providing for the enforcement thereof.

21. The only obligations of this Decree are those explicitly stated herein.

22. Good faith efforts to comply with the provisions of this Decree are the standards of compliance for this Decree except where the law provides a higher standard.

23. In the event that upon final approval and entry of this Decree appeal is taken therefrom, the monies described in paragraphs 13(b) and 17 (except interim fees awarded and paid) shall be deposited by defendants in an interest bearing special account with the Treasurer of the City and County of San Francisco, to be paid, together with accrued interest, only in the event of final resolution of the appeal upholding the provisions of this Decree supporting or justifying an award of attorneys' fees and/or monetary relief.

XIII

NOTICE

Notice of this Decree shall be provided to members of the class of plaintiffs in accordance with the Court's order of March 30, 1979.

Consent to the entry of the foregoing Decree is hereby made.

ROBERT L. GNAIZDA
LOIS SALISBURY
Public Advocates, Inc.

By _____
(s) Robert L. Gnaizda

By _____
(s) Lois Salisbury

OLIVER JONES
NAACP—Western Region

By _____
(s) Oliver Jones

Attorneys for Plaintiffs

STEPHEN WARREN SOLOMON, INC.

By _____
(s) Stephen Warren Solomon

By _____
(s) Ralph B. Saltsman

Attorneys for Intervenor
Police Officers Association

GERALD F. GEORGE
MAIMON SCHWARZSCHILD
Attorneys
Department of Justice

By _____
(s) Gerald F. George

By _____

(s) Maimon Schwarzschild

Attorneys for United States

_____

(s) George Agnost

City Attorney

_____

(s) Michael C. Killelea

Deputy City Attorney

_____

(s) Philip S. Ward

Deputy City Attorney

_____

(s) Jerome A. DeFilippo

Deputy City Attorney

_____

(s) Kenneth J. Harrington

Deputy City Attorney

Attorneys for Defendants

This Consent Decree is finally approved and its entry is ORDERED.

EXHIBIT "A"

UNITED STATES DEPARTMENT OF JUSTICE
LAW ENFORCEMENT ASSISTANCE
ADMINISTRATION
Washington, D.C. 20531

Complaint No.: 77-C-104

In the Matter of:
The Office of Civil Rights Compliance

and

Chinese for Affirmative Action
Complainant

and

San Francisco Police Department
Respondent

RESOLUTION AGREEMENT

In response to a complaint alleging that Respondent has failed to provide adequate service to the Chinese-speaking community of San Francisco, the LEAA Office of Civil Rights Compliance (OCRC) has examined substantial evidence related to that claim. This evidence includes:

1. Data indicating that approximately half of the City's 65,000 Chinese-speaking residents do not speak English;

2. Police department employment figures showing that only five (5) of the department's 1,670 sworn personnel (0.3%) are bilingual (Chinese/English);

3. Interviews conducted with Chinese-speaking residents of the City, describing the adverse effect of Respondent's lack of bilingual (Chinese/English) officers on police service to the Chinese-speaking community;

4. Interviews conducted with police officers, including bilingual (Chinese/English) officers, all relating to the problems associated with making a timely and meaningful response to calls for assistance from the Chinese-speaking community.

LEAA has also found the Respondent willing to voluntarily resolve this matter in an equitable fashion. To that end, LEAA and Respondent hereby adopt the following terms of resolution:

1. It is understood by the parties that this Agreement does not constitute an admission by the Respondent of any violation of Section 518(c)(1) of the Crime Control Act of 1976.

2. The Respondent agrees to report in writing to the Director, OCRC, LEAA—U.S. Department of Justice, Washington, D.C. 20531, regarding how it is completing the undertaking outlined in the following paragraphs of this Agreement. This report shall be submitted not later than ninety (90) days from the date of this Agreement.

3. This Agreement does not address allegations of discrimination on the basis of race, sex, or national origin in Respondent's hiring and promotion practices. LEAA has asked the Civil Rights Division of the Department of Justice to assume primary responsibility for those issues.

4. The parties agree that service to the Chinese-speaking community can be improved by strengthening the Respondent's bilingual (Chinese/English) capability. To that end, the Respondent agrees to develop and maintain liaison with groups in the Chinese-speaking community, the public education secondary system in San Francisco proper, and selected colleges in the Bay Area in order to develop more effective methods of communicating department employment opportunities to Chinese-speaking students.—

5. The Respondent will offer to upgrade the bilingual skills of present Chinese-speaking officers for the purpose of assigning them in the Chinese-speaking community. To that end the Respondent will cooperate with Chinese for Affirmative Action, other community groups and interested educational institutions for the purpose of improving the bilingual skills of Chinese-speaking officers. The Respondent agrees to count time spent by such officers in classes and training for this purpose as "on duty" time and shall pay the tuition and all other reasonable costs incurred by officers in connection with such training.

6. The Respondent agrees to continue to maintain an anti-extortion task force as was organized on September 4, 1977, the membership of which will include bilingual (Chinese/English) officers. The officers of the task force will make visits to Chinese-American businesses and attempt to create mutual confidence between members of the Chinese-speaking community and the department, seeking to improve the community's awareness of department activities. The task force's key objective will be to make reductions in the number of extortions in the Chinese-speaking business community, with particular emphasis on Chinatown and Richmond businesses. This unit's efforts shall be highly publicized.

7. The Respondent agrees to inform the Chinese-speaking community of the activities it is undertaking to protect and serve the Chinese-speaking community in particular. This information shall be disseminated via English and Chinese language newspapers, and Chinese and English public service announcements on radio and television. These announcements shall encourage members of the Chinese-speaking community to participate in the publicized activities.

8. The Respondent agrees to inform in writing the Civil Service Commission of the City and County of San Francisco that:

   a. police services are a concern of San Francisco's Chinese-speaking community and,

   b. these concerns should be represented at interviews held by boards appointed by the Civil Service Commission for entry level positions (sworn and non-sworn) in the police department and,

   c. an effective means of achieving this goal would be the inclusion of Chinese-speaking members of San Francisco's Chinese-American community as members of or advisors to such boards.

9. The Respondent agrees that OCRC, on its own motion, may review compliance with this Agreement. As part of such review, OCRC may require written reports concerning compliance, may inspect the premises, examine witnesses, and examine and copy documents.

10. It is mutually agreed that this Agreement shall become effective as of the date all parties have signed below and shall remain in effect for two (2) years from said date. Respondent shall submit semi-annual reports for the periods ending June 30, 1978, December 31, 1978, June 30, 1979 and December 31, 1979. The reports will be due within thirty (30) days after these respective dates.

11. This Resolution Agreement shall terminate sixty (60) days after the Respondent files its last semi-annual report with OCRC in accordance with paragraph 10 above. OCRC may make a finding of non-compliance with the provisions of this

Agreement at any time prior to sixty (60) days after the date Respondent submits its final report. Thereafter, OCRC shall have no further jurisdiction to make findings of non-compliance with this Resolution Agreement. If LEAA makes a determination of non-compliance with the terms of this Agreement, it shall institute administrative action pursuant to Section 518(c) of the Crime Control Act of 1976. LEAA may also, if appropriate, request the Civil Rights Division of the Department of Justice to take action to enforce Respondent's compliance with the terms of this Agreement.

12. The parties understand that this Agreement in no way restricts LEAA's authority or duty to take administrative action in connection with other issues of discrimination not addressed by this Agreement.

I have read the foregoing four (4) pages and I accept and agree to the provisions contained therein:

	December 28, 1977
(s) Charles R. Gain, Chief of Police City and County of San Francisco California	date
	December 21, 1977
(s) Lewis W. Taylor, Director Office of Civil Rights Compliance LEAA—DOJ	date

EXHIBIT B

GUIDELINES FOR MASTER REGARDING DISTRIBUTION OF MONETARY RELIEF DESCRIBED IN PARAGRAPH 13(b) OF THE CONSENT DECREE

I. GUIDELINES FOR DISTRIBUTION

The distribution of the monetary relief of this Consent Decree shall be administered by the Master according to the following guidelines:

(1) A party claiming recovery under any of the prescribed categories below may only seek recovery under one claim of eligibility, with the exception of those parties who, in collecting more than one claim will not recover more than $620. In no event shall any claimant for backpay receive more than the maximum individual limit indicated below.

(2) For those sub-classes where a fixed total amount is designated, the Master shall make a pro-rata distribution, subject to that upper limit. In those categories where no fixed total is designated, the Master shall allocate payment so that allocation among these sub-classes results in the maximum proportionate individual recovery for the maximum number of claimants, subject to the maximum individual limit indicated.

(3) All claims for backpay and other relief are subject to standards of proof which have been agreed upon by the parties as set forth in part II, *infra.*, and shall be reviewed and applied by the Master to verify each individual claim.

Backpay Relief For Class Members and Named Plaintiffs

	Maximum Individual Recovery	Fixed Total (If Designated)
1. Minorities		
a. Failed to secure permanent appointment to Sergeant (Q-50) as a result of taking the 1971 Q-50 exam, including those persons who were discouraged from taking the 1971 Q-50 examination as evidenced by at least two previously unsuccessful attempts to obtain a Q-50 position through examinations.	$3,720	
b. Completed written examination process for Q-2 from 1970 up to and including 1974 or took 1969 Q-20 and did not secure appointment, or were disqualified because of height. (Does not apply to those persons who were disqualified because of background, medical, or oral.)	$ 310	$46,500
c. Minorities who completed the Q-35 written examination in 1972 and did not receive appointment.	$1,860	
d. Minorities who took and failed the 1976 Q-50 examination.	$ 620	
e. Minorities who took and failed the 1976 Q-35 examination.	$ 310	
2. Women		
a. Women who took last Q-20 examination and not receive appointment from the eligible list.	$1,860	
b. Women who passed the 1974 Q-2 written examination, but did not complete the process.	$ 310	$46,500
c. Women who were appointed from the 1974 Q-2 list to police officer positions and who reached their 21st birthday on or before December 31, 1972.	$1,860	

d. Women who served as Q-20 policewomen and were precluded from taking the Sergeant's examination until 1976 and completed said examination, placing on the informational roster.	$3,720
e. Women who served as Q-20 policewomen and were precluded from taking the Sergeant's examination until 1976, and who entered the Police Department prior to January 1, 1970.	$3,720

II. GUIDELINES FOR PROOF OF CLAIMS

Proof Guidelines For Distribution Under Part 1

(1) *Proof Of Qualification*

With the cooperation of the defendants, the individuals shall document that they did take the examination described, and did or did not receive the appointment or promotion described. These matters shall be set forth in a declaration, which shall also include a statement verifying that the individual met the other minimal requirements for the position, including, where appropriate, residency, age and full duty status qualifications.

(2) *Possible Mitigation*

The monetary distributions described in paragraphs 1(a), 1(d), 2(d) and 2(e) of this exhibit are based upon the presumption that the class member held a Q-2 or Q-20 position during the years 1970 to the present. In the event they held an assistant inspector or inspector's position or a position on the solo motorcycle detail for any of those years, or left the force, their claim shall be reduced proportionately for the years and differential involved.

EXHIBIT C

RELEASE

For and in consideration of the payment to the undersigned of the sum of ——— dollars, receipt of which said sum is hereby acknowledged, the undersigned hereby releases and discharges the City and County of San Francisco, all agents, employees, departments, commissions, commissioners and officers thereof of and from all action, causes of action, damages, claims and demands, made or which could have been made, in law or in equity, of every kind and character, including any and all claims for back pay, damages or other relief provided for under 42 U.S.C. Sections 1981 and 1983 and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000e, *et seq.*), which resulted from the hiring, promotional or other employment practices of the San Francisco Police Department, which was made the subject of litigation in the cases of *Officers for Justice v. Civil Service Commission*, U.S.D.C. No. C-73-0657 RFP and *U. S. A. v. City and County of San Francisco*, U.S.D.C No C-77-2884 RFP, and all damages heretofore sustained, or hereafter to be sustained by reason of said employment practices, and all claims arising out of said employment practices, whether known or unknown, suspected or unsuspected.

It is further understood that this settlement is a compromise of a disputed claim and that the payment is not to be construed as an admission of liability on the part of the City and County of San Francisco or any of its agents, employees, departments, commissions, commissioners or officers, by whom liability is expressly denied.

IN WITNESS WHEREOF, the undersigned have hereunto set their hands this ——— day of ————, 19—

Witness: ———.

(Type or Print Name Under Signature)

No. 92-1298

In The

Supreme Court of the United States

October Term, 1992

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
OFFICERS FOR JUSTICE, et al.,
UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The petition challenges a decision by the Ninth Circuit upholding the use of a "sliding band" by the City and County of San Francisco ("City"). The City proposed to use the sliding band to make certain promotions within the San Francisco Police Department. The sliding band permitted the Police Department to consider the experience, training, disciplinary record and minority status of each candidate whose promotional test score fell within a precisely defined, narrow numerical range. This process enabled the City to make some moderate progress toward satisfying the goals of a consent decree and ending twenty years of federal litigation.

The sliding band affords greater precision for the use of test scores than other methods previously approved by courts. Rather than arbitrarily grouping numerical scores into a level or grade from which candidates may be chosen, the sliding band arranges scores based on the standard concept of statistical significance. The sliding band ensures that no candidate will be passed over in favor of another whose test score is lower by a statistically significant factor.

The sliding band permits measured and limited use of affirmative action to overcome the discriminatory patterns of past practices. The district court's opinion, which allows race or gender to be used as one of several factors in choosing among candidates whose scores show no reliable difference in their qualifications, rests on sound scientific principles and extensive expert testimony. No reported decision of this or any other court implies that

an employer must hire strictly in accordance with the numerical order of test scores.

Contrary to petitioner's assertion, the Ninth Circuit's opinion is limited to the unique circumstances of this litigation. The petition, however, fails to present an accurate account of the facts justifying the City's proposal.

1. The Consent Decree.

In 1979, the district court approved a consent decree ("Consent Decree" or "Decree") ending years of bitter litigation over the hiring and promotional procedures of the San Francisco Police Department ("SFPD"). The trial court's decision was affirmed by the Ninth Circuit in 1982, and this Court denied a petition for writ of certiorari in 1983. *Officers for Justice v. Civil Service Comm'n*, 473 F.Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983).

The Decree settled two federal actions. In 1973, a group of minority and female police officers called Officers for Justice ("OFJ") joined several individuals and organizations to file a suit against the City alleging racial and sexual discrimination in the Police Department. Shortly thereafter, the petitioner, the San Francisco Police Officers Association ("POA"), intervened as a defendant. In 1977, the United States filed a separate suit alleging discrimination in the Department, and in early 1978 the two actions were consolidated.

As noted by the Ninth Circuit in its opinion affirming the Decree, the plaintiffs presented a "forceful statistical demonstration" of *prima facie* discrimination:

> [Minorities and women] appeared to be vastly underrepresented in the upper ranks of the department. Moreover, minorities and women appeared to be concentrated in certain units, bureaus, and subdivisions in the department, while virtually absent in others. Plaintiffs claimed these discrepancies resulted primarily from the use of unvalidated written examinations and various other class-biased screening and selection devices.

Id. 688 F.2d at 618-19.

After the district court issued preliminary orders enjoining certain employment practices, the consolidated actions proceeded to trial in November, 1978. 473 F.Supp. at 804. After two weeks of trial, the parties initiated settlement discussions that resulted in the Consent Decree. *Id.* Following a fairness hearing, the district court approved the Decree in March 1979.

The Consent Decree contains a general prohibition against "any practice which has the purpose or effect of unlawfully discriminating against any employee [or applicant for employment] because of such individual's race, sex or national origin." 473 F.Supp. at 811. By its terms, however, the Decree "provides for specific, definable and good faith efforts to be made [by the City] to achieve certain goals for employment of women and minorities . . . within specified periods of time." *Id.* at 810. These goals apply to hiring and promotional practices:

> In order to eradicate the present effects of past hiring and promotion practices with respect to minorities and women, the City shall adopt and

> seek to achieve as a long-term goal the recruitment, appointment and promotion of qualified minorities and women in sufficient numbers so as to increase substantially the minority and female composition of the San Francisco Police Department so that it more nearly reflects the racial, ethnic and sexual composition of the relevant labor force of the City and County of San Francisco.

Id. at 813.

The Decree establishes a long-term goal of raising to 45% the minority representation in the Department. The Decree also sets annual entry level goals of filling 50% of all vacancies with minorities and 20% of all vacancies with women. *Id.* For each of the promotional ranks of assistant inspector, sergeant, lieutenant, and captain, the Decree establishes a goal of appointing minorities and women in proportion to their representation in the qualified applicant pool. *Id.* at 814-15. The Decree provides that the use of an examination will not justify the failure to meet a goal unless the examination is shown to be valid under the *Uniform Guidelines On Employee Selection Procedures*, 29 C.F.R. 1607 ("*Uniform Guidelines*"). *Id.* at 813.

The Decree provides that it will continue in full force and effect for a period of ten years from its date of approval. *Id.* at 820. However, due to the prolonged delays caused by the litigation discussed below, the City could not seek an order of dismissal when the Decree was scheduled to expire in 1989. Thus, four years after its scheduled termination, the Decree continues to govern the employment practices of the SFPD.

2. Prior Litigation Over Promotions.

The instant petition concerns promotions to the ranks of Q-35 Assistant Inspector ("Assistant Inspector") and Q-50 Sergeant ("Sergeant"), the first promotional ranks above entry level police officer.[1] Appointment to these ranks have been the subject of federal litigation for two decades.

In 1973, shortly after the OFJ filed suit the district court found that the 1971 Sergeant examination had a disparate impact on minorities. The court ordered the City to appoint one qualified minority from the examination list to the rank of Sergeant for every nonminority selected. *Officers For Justice v. Civil Service Comm'n*, 371 F.Supp. 1328, 1342 (N.D. Cal. 1973).

In 1977, the district court extended its order requiring "one for one" permanent promotions to the temporary promotions of individuals to the rank of Sergeant. *Officers for Justice v. Civil Service Comm'n*, 14 Empl. Prac. Dec. (CCH) ¶7548 (N.D. Cal. 1977). The district court also enjoined the City from making appointments from the results of the 1976 Assistant Inspector examination because the plaintiffs had raised serious questions

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[1] In the SFPD promotions to the ranks of Sergeant and Assistant Inspector are made from the entry level rank of police officer. Assistant Inspectors become Inspectors after completion of two years in the rank. A person may hold dual rank. Thus, an individual who is currently a Sergeant may compete for appointment to the rank of Assistant Inspector, and an Inspector may compete for the rank of Sergeant. Persons who achieve a dual rank are referred to as Sergeant or Inspector depending on their assignment to patrol or investigative duties.

regarding the adverse impact of that test against minorities. *Officers for Justice v. Civil Service Comm'n*, 14 Empl. Prac. Dec. (CCH) ¶7549 (N.D. Cal. 1977).

The early challenges to examination procedures were resolved through the settlement that resulted in the Consent Decree. The Decree sets forth the following specific goals:

> [T]he City shall, subject to the availability of qualified minority and female applicants, adopt and seek to achieve an annual goal of selecting minorities and women for promotion to permanent Sergeant and Assistant Inspector positions in proportion to their representation in the qualified applicant pool for each examination.

473 F.Supp. at 815. The Decree provides that the City may not justify a failure to meet the above goal "unless the [selection] procedure or examination is shown to be valid under the *Uniform Guidelines.*" *Id.* at 813.

By an order dated October 1, 1979, the District Court directed the City to establish a "Consent Decree Unit" to administer and coordinate the City's obligations under the Decree. In consultation with the court-appointed "Auditor-Monitor," the Consent Decree Unit was charged with developing and administering examinations to meet the Decree's specific requirements.

Under the direction of the Consent Decree Unit, the City administered Sergeant and Assistant Inspector examinations in 1983. Each test comprised three parts: multiple choice, written communication and oral examination. Each part was assigned a certain weight as a

percentage of a candidate's final score. Both examinations, however, produced "severe adverse impact for minorities." *San Francisco Police Officers' Ass'n v. City and County of San Francisco*, 621 F.Supp. 1225, 1227 (N.D. Cal. 1985).

A court-appointed expert reviewed the tests and found that "insufficient attention was paid to the issue of adverse impact." *Id.* at 1228. The expert concluded that the City did not explore alternatives, especially to the use of the multiple choice test, that "may have minimized such impact." *Id.* Accordingly, the Civil Service Commission revised the system by which the examinations' components were weighed in order to reduce the adverse impact. The multiple choice and written communication components of the exam were scored on a pass-fail basis; the oral component of the exam was made the sole ranking device. *Id.*

The district court approved the reweighing system as an appropriate means to remedy the adverse impact. *Id.* at 1233. The Ninth Circuit reversed this holding, however, finding that the reweighing was not "a carefully contoured affirmative action plan." *San Francisco Police Officers' Ass'n v. City and County of San Francisco*, 812 F.2d 1125, 1132 (9th Cir. 1987). Changing the weights of the exam components after the results were announced, the appellate court found, dramatically altered a candidate's ability to prepare effectively for the examination. *Id.* at 1132. Once the results were reported the "City was required either to validate its initial examination or, if it could not, to devise and administer an alternative selection procedure that did not have an adverse impact." *Id.* at 1133. The Ninth Circuit directed the City to discard the

results of the reweighed examinations and administer a new selection procedure. *Id.*

On rehearing, the Ninth Circuit refused to penalize the beneficiaries of the reweighing plan by removing them from their positions as Sergeants and Assistant Inspectors. Because the City had abandoned the promotional lists and the existing appointees would not be replaced, the Ninth Circuit dismissed the appeal as moot and withdrew the original opinion. *San Francisco Police Officers' Ass'n v. City and County of San Francisco,* 842 F.2d 1126 (9th Cir. 1988). On further rehearing, the Ninth Circuit reinstated its original opinion but declined to award any relief. *San Francisco Police Officers' Ass'n v. City and County of San Francisco,* 869 F.2d 1182 (9th Cir. 1988). This Court denied the POA's petition for a writ of certiorari. *San Francisco Police Officers' Ass'n v. City and County of San Francisco,* 493 U.S. 816 (1989).

3. The Current Dispute Over Promotions.

During the litigation over the 1983 examinations, the district court issued a "Supplemental Order" in October 1986 setting forth an accelerated schedule for examinations. This order required the administration of two sets of Sergeant and Assistant Inspector examinations: the first set by December, 1986, and the second set by December, 1988.

The continuation of litigation in the Ninth Circuit over the 1983 examinations, however, further postponed the administration of the revised examinations. By an order dated August 10, 1989, the district court directed the City to administer Sergeant and Assistant Inspector

examinations by December, 1989. The order also required the City to appoint 100 Sergeants and 60 Assistant Inspectors from the results of these examinations.

The City engaged outside testing experts who took extensive precautions to create valid examinations. The experts performed a detailed and thorough job analysis for each position. Based on these studies, the experts specifically constructed the examinations to minimize the possibility of adverse impact. Because the professional literature shows that written and multiple choice examinations tend to produce adverse impact, the test developers eliminated those components from the test designs. Instead, the examinations consisted of elaborate "assessment centers" in which candidates were required to perform the actual tasks assigned to Assistant Inspectors or Sergeants. For example, each Assistant Inspector candidate interviewed actors posing as witnesses; each Sergeant candidate counseled an actor playing the role of a subordinate officer.

Rather than require candidates to respond in writing, candidates' responses were tape recorded for scoring purposes. The only writing required by the examinations was the report writing actually required by each position. The audiotapes were graded by racially mixed groups of "raters." A statistical analysis was performed to insure that a rater's scoring did not vary on the basis of the race of the candidate. This analysis showed no such rater bias.

Despite the City's sedulous efforts, the 1989 examinations produced severe adverse impact with regard to minorities if the candidates were selected in rank order

strictly according to test scores. The City, however, proposed to use a "sliding band" as an alternative means to select candidates from the examination results.

4. The Sliding Band.

Before the 1989 examinations, the applicants had been informed that the City might use a "sliding band" to meet the goals of the Decree. Each candidate was given a brief explanation of the banding process that the City had used for two years to satisfy the requirements of a similar consent decree in the City's fire department. The City explained that "scores within a band are considered equivalent" because "persons in the band are more or less 'tied' for rank order." The candidates were also informed that if banding were used, "some consideration [would] be given to avoid adverse impact against minorities and women."

Based on fundamental statistical principles, the sliding band quantifies the imprecision inherent in employment testing. The "standard error of measurement" for any examination indicates the degree to which scores are influenced by measurement error. In theory, each candidate has a "true score" that is not influenced by the errors and chance factors present in examinations. A true score is defined as the average score that would be achieved over an infinite number of administrations of identical examinations. The true score would emerge as extraneous factors average out. The standard error of measurement defines the limits of variance around an observed score within which a candidate's true score would fall with a certain degree of probability.

The standard error of measurement is computed by using a common formula that relates the standard deviation of the scores actually produced by the examination to the reliability coefficient for the examination.[2] The result indicates a numerical range in which the differences between scores reflect, with a high degree of confidence, measurement error rather than actual differences in the knowledge, skills and ability of candidates.[3]

Scores that are separated by less than the width of the band are considered substantially equal for purposes of selection. Because the band is based on the relative difference between scores, it has a function described as "sliding." Once the candidate with the highest score within a band is selected, the band "slides" so that its upper limit rests on the highest score remaining on the list. The band then comprises all scores that are not separated by a statistically significant factor.

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[2] The standard error of measurement is computed by multiplying the standard deviation of scores from the examination times the square root of 1 minus the reliability coefficient (SEM = SD x $\sqrt{1-RXX}$). The standard deviation measures the amount of actual variance on either side of the mean score of a particular examination. The greater the variance of score distribution around the mean, the higher the standard deviation. On a normal, or standard, distribution, 95% of the scores fall within plus or minus two standard deviations from the mean score. The reliability coefficient measures the internal consistency among various components of the examination as a measure of relevant job qualifications.

[3] The City multiplied the standard error of measurement by a confidence factor of 1.96 to derive the final band width. Statistical theory teaches that a factor of 1.96 times the SEM will indicate the range in which a candidate's true score will fall with 95% probability.

For the tests in question, application of the formula produced narrow bands. Each examination was graded on a 100 point scale. The band for the Sergeant examination was 4.0 points; the band was 5.48 points for the Assistant Inspector examination.

When the parties failed to reach a negotiated solution, the City filed a motion for a declaratory judgment approving its proposal to use the sliding band. The City requested permission to make 15 Sergeant promotions in addition to the 100 promotions required by the Court's order. The first 100 promotions would be made in rank order to meet any expectations created by the district court's earlier orders. The additional 15 Sergeant promotions would be made using the band. The City also proposed to use the sliding band to appoint no more than 7 Assistant Inspectors in addition to 60 appointed in rank order.

The district court heard three days of expert testimony on the City's motion for declaratory relief. The City called an expert on statistics, Dr. Bernard Sisken, to demonstrate the validity of banding as a method of selecting candidates. Dr. Sisken testified that the City's proposal was an appropriate use of statistics to define reliable differences between the scores of candidates. The City also called two experts in psychometrics, Dr. Sheldon Zedeck and Dr. James Outtz, who agreed that the City's method of banding was substantially equally valid to rank order selection for purposes of the *Uniform Guidelines.*

The POA called two experts, Dr. Ingram Olkin, an expert on statistics, and Dr. Lawrence Meyers, an expert in psychometrics. Although they disagreed with the

City's interpretation, both POA experts agreed on the City's computation of the band and the concept of significant differences between scores as measured by the band.

As described above, the City's initial banding proposal relied on minority status as the sole criterion for selection of candidates whose scores fell within the same band. On June 6, 1991, the district court declared that the City's plan violated the restrictions on race conscious remedies set forth by this Court in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), and by the Ninth Circuit in *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989). (Pet. App. at 48a-59a) The district court recognized, however, that banding was an appropriate use of test scores and invited the City to submit a modified proposal that included other criteria. The Court urged the City to consider the approach accepted by the Second Circuit in *Bridgeport Guardians v. City of Bridgeport*, 933 F.2d 1140 (2nd Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 337 (1991). (*Id.* at 58a)

On June 28, 1991, the City proposed certain additional factors to select among candidates whose scores fell in the same band. On August 21, 1991, the district court issued the order approving the City's proposal. (*Id.* at 15a – 47a) The court specifically approved the City's calculation of a band for each examination based on the standard error of measure. (*Id.* at 31a) The court accepted the City's proposal to treat persons whose scores fall below the lower limit of a band as significantly less qualified than those persons whose scores are within the band. (*Id.* at 32a) The court further found that "the City's proposed selection criteria are legally sound." (*Id.* at 45a) These criteria include professional conduct, education,

training and experience as well as the Department's affirmative action goals. (*Id.* at 46a)

5. The Ninth Circuit Decision.

In an opinion by Chief Judge J. Clifford Wallace, a panel of the Ninth Circuit unanimously affirmed the District Court's order. *Officers for Justice v. Civil Service Comm'n*, 979 F.2d 721 (9th Cir. 1992) (Pet. App. at la-14a). The opinion noted that the district court had heard extensive expert testimony in support of the plan, and that the principle of statistical deviation underlying banding was approved in *Castaneda v. Partida*, 430 U.S. 482 (1977). 979 F.2d at 727. The Ninth Circuit specifically rejected the argument, advanced in the instant petition, that an employer is required by federal law to hire in strict rank order even when scores are not separated by a significant difference:

> The district court heard evidence that the test scores themselves are imprecise measurements of future job performance and that by banding the scores and considering secondary criteria in making promotion decisions, the City may increase the probability that the most qualified candidates will be promoted. The district court did not clearly err in finding that banding, as proposed by the City, is more valid, or at least "substantially equally valid" to rank order promotions.

Id. at 728.

The Court of Appeals also held that City did not violate equal protection or Title VII through the limited

use of race or gender as factors together with other relevant criteria to select candidates from within the band. The Court held that in light of the "historical context" of this litigation, the "City's admission of past discrimination" and the adverse impact of the examinations, there was a strong basis in the evidence to satisfy the standard for voluntary affirmative action under *United States v. Paradise*, 480 U.S. 149 (1987). 979 F.2d at 726.

The Court of Appeals rejected the POA's argument, also repeated in the petition, that Congress outlawed all forms of race conscious, affirmative action by enacting the Civil Rights Act of 1991 (Pub. L. No. 102-166, 105 Stat. 1071 (1991) (the "1991 Act" or "Act")). The POA argued that such practices are prohibited by section 107 of the Act, which makes unlawful employment practices in which race or gender "is a motivating factor." The Ninth Circuit easily dismissed this argument, noting that section 116 of the Act exempts lawful affirmative action programs from the prohibitions in section 107.

REASONS FOR DENYING THE WRIT

The Ninth Circuit's decision reflects the unique factual history of this case. Rather than risk more intrusive forms of court-ordered relief, the City entered into the Consent Decree which mandates affirmative measures to overcome the discriminatory results of past practices. The appellate court approved the City's proposal to meet the terms of the Decree by using the sliding band as an alternative to rank order selection. The decision does not,

as petitioner asserts, require employers who have no similar history or legal obligations to use a sliding band to overcome adverse impact.

Petitioner argues that the decision is an "unwarranted federal intrusion" into the personnel practices of state and local agencies. The City, however, was never ordered to use the sliding band. The City sought court approval for its proposal as a form of voluntary affirmative action that was justified by the goals of the Consent Decree and supported by the evidence of past discriminatory practices which made the Decree necessary. The sliding band enabled the Police Department to consider a candidate's experience and disciplinary record, among other factors, in making promotions. What would be an unwarranted federal intrusion is the result petitioner seeks: a requirement that an employer hire in strict numerical order from the results of a valid, but imperfect, examination.

Petitioner's attempt to gain review of the decision on grounds relating to the 1991 Civil Rights Act is equally unavailing. Whether the Act applies retroactively has no bearing on the outcome; the Ninth Circuit held that the City's use of the sliding band under the unique circumstances of this case is lawful under the Act as well as under the law in effect before the Act was passed. Petitioner's claim that the Act outlaws affirmative action flies in the face of the statutory language and express Congressional purposes.

I. THE NINTH CIRCUIT'S APPROVAL OF THE SLIDING BAND AS A FORM OF VOLUNTARY AFFIRMATIVE ACTION WAS BASED ON EXTENSIVE EVIDENCE AND EXPERT TESTIMONY.

Petitioner's argument that the Ninth Circuit's decision is an improper intrusion into civil service procedures conflates two separate objections. First, petitioner asserts that the trial and appellate courts erred in the factual determination that candidates selected through the sliding band and candidates selected in strict rank order are equally qualified. Second, petitioner claims that the decision will cause other employers to adopt *"ad hoc"* procedures that will undermine merit based selection. These objections misrepresent the evidence before the trial court and the holding of the Ninth Circuit.

The City did not propose the sliding band as a method to select candidates whose qualifications would "equal" those of candidates chosen in strict rank order according to numerical scores. The City proposed to use the sliding band as a method that was "substantially equally valid" to strict rank order selection within the meaning of section 1607.3(B) of the *Uniform Guidelines.* The City presented the sliding band as a selection procedure that allowed the Police Department to consider other qualifications if differences in scores did not indicate reliable differences in ability.

As petitioner's own expert testified, if the predictive value of one selection method is not statistically significantly lower than another method, the methods are "substantially equally valid" within the meaning of section

1607.3(B) of the *Uniform Guidelines*. The sliding band proposal is based on this same concept of statistical significance. Candidates are treated differently only if their scores are separated by a statistically significant factor. If there is such a significant difference, the employer can assert, with a high degree of confidence, that the difference in scores will predict a difference in the actual performance of the job in question.

Test scores that are not significantly different -- test scores that fall within the band – cannot predict, with a high degree of reliability, differences in actual job performance. This view is commonly accepted in practice. As the trial testimony showed, many aptitude tests report the range of possible variance in a candidate's test score due to measurement error. Such reports discourage undue reliance on small numerical differences in scores. The traditional system of assigning letter grades to test results also reflects the view that small differences in numerical scores are not reliable for purposes of distinguishing among students.

Letter grades, percentile ordering and other methods of arranging scores into groups free employers from a rigid system in which any difference in a numerical score, no matter how small, would determine a decision about hiring or promotion. Civil service systems, for example, traditionally rely on the "rule of three" to give the appointing authority the discretion to choose among the top three scores on a list.

The sliding band affords a more precise use of test scores than methods such as letter grades or the rule of three that make arbitrary distinctions among test scores.

The rule of three, for example, permits an appointing authority to select the second highest score even when there is a statistically significant difference between the first and second score. This result would not occur through the use of the sliding band: scores are treated differently only when there is a difference between scores that indicates a reliable difference in the ability to perform the job. Thus, the sliding band preserves merit based selection with appropriate recognition of the imprecision and measurement error inherent in employment testing.

Under the sliding band procedure, if test scores do not indicate a reliable difference in ability, an employer may consider other factors that are related to reasonable objectives. The City proposed to consider work history, special experience and disciplinary records. Certainly these are reasonable factors, especially in light of the duties of a police officer. No court has ever suggested that such criteria violate federal law.

The City's procedure also permitted the Police Department to consider the goals of the Consent Decree in selecting candidates whose test scores indicate no reliable differences in ability. Such limited use of affirmative action was clearly justified, as the Ninth Circuit held, by the evidence of discrimination resulting from earlier reliance on unvalidated procedures and the City's failure to meet the goals of the Consent Decree. *Officers for Justice*, 979 F.2d at 726-27.

The Ninth Circuit agreed with the district court, which has overseen this litigation for twenty years, that

the Decree's prohibition on discrimination did not preclude the use of the sliding band. The Consent Decree's requirement that the City undertake good faith, affirmative measures to reach the goals of the Decree clearly contemplates forms of voluntary affirmative action such as the sliding band. *Id.* at 727.

In short, the sliding band is predicated on the notion, widely accepted in theory and practice, that insignificant difference in numerical scores cannot reliably predict differences in actual job performance. The City's use of banding to meet the goals of the Consent Decree was supported by the particular history and evidence in this case.

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF THIS AND OTHER COURTS REGARDING THE USE OF TEST SCORES.

Petitioner incorrectly suggests that the Ninth Circuit's decision contradicts the holdings of other courts regarding the use of test scores, the interpretation of consent decrees and the use of affirmative action to select candidates whose examination scores indicate no reliable difference in knowledge skills or ability. Petitioner, however, cites decisions that demonstrate no such conflict.

Petitioner relies on *Bridgeport Guardians v. City of Bridgeport*, 933 F.2d 1140 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 337 (1991), in support of the argument that banding is appropriate only for poorly designed, unreliable examinations. Petitioner argues that the Second Circuit approved banding because the City of Bridgeport

"could not show that the results of the examination were reliable enough to justify appointments in rank order." (Pet. at 13)

Petitioner misreads *Bridgeport Guardians*. In that case, the City of Bridgeport had established that the challenged exam was "content valid and justified by the City's business needs." 933 F.2d at 1148. Nevertheless, the plaintiffs "had sufficiently rebutted that evidence by showing that the City could have elected to use banding in order to alleviate the disparate racial effect of the examination without disserving its legitimate needs." *Id.* Thus, the Second Circuit approved the use of the sliding band for a reliable examination because the terms of a consent decree and the evidence of disparate impact and past discrimination justified that remedy.

Citing *Afro-American Patrolmen's League v. City of Atlanta*, 817 F.2d 719 (11th Cir. 1987), petitioner maintains that the Ninth Circuit's decision deprives nonminorities of enforceable rights under consent decrees. Petitioner maintains that the decision will act as a disincentive to public agencies to enter into settlements of Title VII actions.

Petitioner's reliance on *Afro-American Patrolmen's League* is also misplaced. In that case, the consent decree specifically forbade the City of Atlanta from engaging in affirmative, race conscious relief to meet the terms of a consent decree. The explicit terms of the decree required the City to validate examinations and hire from those examinations without respect to the race or gender of candidates. *Id.* at 724.

By contrast, the Consent Decree in the instant case imposes no restriction on the use of test results. As the Ninth Circuit noted, the Consent Decree contemplates the type of affirmative relief prohibited by the decree in *Afro-American Patrolmen's League*. The Ninth Circuit concluded that "the consent decree itself provides a proper rationale for race conscious promotions and serves as a valid defense against the [POA]'s reverse discrimination arguments." *Officers for Justice*, 979 F.2d at 727.

This Court has recognized that an employer is not bound by federal law to select the highest scoring candidate; selecting a lower scoring but highly qualified candidate is proper to meet legitimate business goals including the terms of a lawful affirmative action plan. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). The sliding band enabled the City to consider other lawful objectives in a procedure that gives more weight to examination scores than methods approved by other courts.[4]

It is ironic that petitioner argues that the Ninth Circuit decision constitutes an unwarranted intrusion into civil service systems and would discourage public entities from compromising Title VII actions by entering into

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[4] See *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 938 (1992) (approving promotions of lower scoring police officers); *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1948 (1992) (promoting officers to satisfy consent decree); *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989) (city's affirmative action plan is a proper basis to promote lower scoring minority); *Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986), *cert. denied sub nom., Cincinnati Firefighters v. Youngblood*, 480 U.S. 935 (1987) (consent decree based on statistical disparities justifies promotions of lower scoring minority candidates).

consent decrees. The City agreed to the Consent Decree to avoid the possibility of more drastic forms of court-imposed relief that might be justified after a finding of intentional discrimination. Far from constituting interference with a civil service system, the sliding band gives the appointing authority some measure of discretion to consider other qualifications of candidates while meeting the goals of a lawful consent decree.

III. THE NINTH CIRCUIT'S INTERPRETATION OF THE 1991 CIVIL RIGHTS ACT PROVIDES NO BASIS FOR GRANTING THE WRIT.

Petitioner argues that the Ninth Circuit's decision presents two important questions regarding the interpretation of the 1991 Civil Rights Act. First, petitioner maintains that the decision should be reviewed to consider the question of the retroactivity of the 1991 Civil Rights Act. Second, petitioner maintains that the Ninth Circuit erred when it held that Congress did not outlaw affirmative action when it passed the 1991 Civil Rights Act. Neither argument presents appropriate grounds for granting the writ.

Petitioner claims that this case presents a "unique" opportunity to decide the issue of the retroactivity of the 1991 Civil Rights Act. This argument ignores the Ninth Circuit's actual holding. The appeals court held that it was unnecessary to reach the issue of retroactivity because it is clear that the provisions of the Act cited by the petitioner did not change the law governing the use of preferences in voluntary affirmative action. *Officers for Justice*, 979 F.2d at 725. Thus, the Ninth Circuit's decision

does not squarely present, for purposes of review by writ of certiorari, the question of whether the Act is retroactive: regardless of whether the law is or is not retroactive, the decision remains the same.

In the appeal to the Ninth Circuit, petitioner argued that the sliding band was prohibited by section 107 of the Act. Section 107 codifies the result in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In that decision, a plurality of this Court held that a plaintiff in a Title VII action will prevail if she proves that an impermissible factor "played a motivating part in an employment decision." *Id.* at 250. The decision expressly provided that it did not apply to "the special context of affirmative action." *Id.* at 239 n.3.

Nothing in section 107 indicates any congressional purpose to apply the *Price Waterhouse* rule to the "special context of affirmative action." To the contrary, in section 116 of the Act, Congress stated that nothing in the Act was intended to disturb affirmative action that is lawful under existing case law. As the Ninth Circuit noted, petitioner's reading of the 1991 Act poses an internal inconsistency: Congress sought to protect affirmative action in section 116 while outlawing it in section 107. *Officers for Justice*, 979 F.2d at 725. Such a reading must be rejected.

"A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1981). It is a fundamental rule of statutory construction that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l*

Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 501 (1986). In the instant case, petitioner argues that the 1991 Civil Rights Act, while addressing seven specifically identified Supreme Court decisions, also overturned two decades of law on affirmative action by implication. Petitioner simply cannot sustain its burden of showing the section 107 prohibits the otherwise lawful use of preferences to meet the goals of a consent decree.[5] Therefore, petitioner's arguments regarding the 1991 Civil Rights Act present no persuasive reason for review of the Ninth Circuit's decision.

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[5] Petitioner also argues that the Ninth Circuit's decision violates the ban on "race-norming" in section 106 of the Act. In "race-norming," candidates were assigned a numerical score in relation to the exam performance of persons in the same racial category. The final scores were used without regard to evidence of prior discrimination; employers often had no knowledge that the scores had been adjusted. As the legislative history demonstrates, this arbitrary practice was not a form of affirmative action designed to overcome past patterns of unlawful discrimination. See H.R. Rep. No. 102-40(II), 102nd Cong., 1st Sess. 65, *reprinted* in 1992 U.S. Code Cong. & Admin. News 694, 750-51.

The sliding band is clearly not "race-norming" or any form of score readjustment prohibited by section 106. Petitioner, moreover, did not properly raise the issue on appeal, and the Ninth Circuit declined to consider the question. *Officers for Justice*, 979 F.2d at 726. Accordingly, petitioner is precluded from raising the issue in its petition.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

DATED: March 4, 1993

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,
Petitioner,

VS.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
OFFICERS FOR JUSTICE, et al.,
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Respondent, Officers for Justice, et al.

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Respondents.

RESPONSE OF PLAINTIFFS TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

This appeal arises out of the Ninth Circuit's unanimous decision authored by Chief Judge Wallace, upholding a voluntary application of an affirmative action device known as the "sliding band". *Officers for Justice v. Civil Service Comm'n*, No. 91-16519 (9th Cir. Nov. 5, 1992) (hereafter "*Officers for Justice* (Cir.)") (appended to Petitioner's writ at 1a).[1] Appeal is brought by the Police Officers Association (the Union).

The Ninth Circuit opinion, affirming Judge Peckham in the district court, upheld the City of San Francisco's proposal to apply voluntarily the sliding band in order to mitigate the adverse impact of a particular set of police sergeant and assistant inspec-

[1] Page cites to this opinion will refer to the appendix attached to Petitioner's writ.

tor exams administered in 1989. That proposal allows the City to treat a statistically-determined range, or "band", of scores as equivalent for the purpose of employee selection. Selection from within the band of scores is based on the application of four criteria including professional conduct, job performance, education, and the City's affirmative action goals with regard to its police department. *Officers for Justice v. Civil Service Comm'n*, Nos. C-73-0657 & C-77-2884 at 46a (N.D.Cal. August 21, 1991) *aff'd* No. 91-16519 (9th Cir. Nov. 5 1992) (hereafter "*Officers for Justice* (D.Ct.)").[2]

There is no conflict in the circuits on the permissibility of banding. No circuit has held voluntary use of the sliding band to be illegal, nor has any circuit supported the Union's position that an employer is required to utilize strict rankorder selection unless and until it proves the selection device to be invalid.

I. THE HISTORICAL CONTEXT

As Judge Wallace noted, the City's proposal "must be viewed within the historical context of this litigation." *Officers for Justice* (Cir.) at 10a. That history spans a twenty-year period begining with the "undisputed history of discrimination" upon which the Consent Decree in this case is based. *Id.* at 3a. Further, the full twenty years—and more—have been marked by an inability to develop sergeant or assistant inspector exams without profound adverse impact against minorities.

This history has also been marked by numerous conflicts among the four parties[3] to this case over the meaning of the underlying Consent Decree. It was the interplay among the four parties which produced this Decree and the relief under review

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[2] Page cites to this opinion refer to the appendix attached to Petitioner's writ.

[3] The lawsuit was filed by the original, private, plaintiffs in this action, Officers for Justice, et al., against the original defendants, Civil Service Commission of San Francisco, et al. The Police Officer's Association intervened as a defendant. The United States filed a separate lawsuit against the City and the two cases were consolidated.

here. While all parties ultimately did not support the City's proposal, its final shape was influenced in significant ways by the parties' various and competing interpretations of the Decree. Unraveling the meanings of the Decree would necessarily be central to a review of the City's banding proposal. In fact, much of the Union's argument for granting certiorari is based on its unique interpretation of the Decree.

A. Pre-Consent Decree History

In 1973, private plaintiffs, Officers for Justice et al., filed this lawsuit against the San Francisco Civil Service Commission, the Police Commission and the Chief of Police charging racial and sexual discrimination. The Police Officers Association (the Union) intervened to oppose the suit.

That same year, the first preliminary relief was granted in this case—and it related to sergeants exams.[4] Judge Robert F. Peckham—the judge who presided over this case from its inception until his death two weeks ago—found that the sergeant examinations for 1967, 1968 and 1971 all had an adverse effect on the opportunities of minority officers for advancement within the department. *Officers for Justice v. Civil Service Comm'n*, 371 F. Supp. 1328, 1333 (N.D.Cal. 1973). As a result of this discrimination, less than three percent of the sergeants in the police department at that time were black, latino or asian. Id. The district court concluded, "[t]he evidence, in short, establishes a prima facie showing of de facto discrimination with respect to the sergeant examination." *Id.*[5]

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[4] For the sake of brevity, this statement focuses on the Department's historic inability to develop nondiscriminatory sergeant and assistant inspector exams—since those are the exams at issue in the instant dispute. However, over the course of the Decree and the litigation leading up to the Decree, there were numerous other disputes resolved by Judge Peckham regarding a variety of employment practices, such as: entrance exams, height requirements, agility tests, lieutenant and captain exams and temporary appointment practices.

[5] The findings of discrimination over the history of this litigation were by no means limited to sergeants exams. *See, e.g., Officers for Justice v.*

Then, in 1976, sergeant and assistant inspector exams were ain offered, and again both had adverse impact.[6] Further, with ag gard to temporary sergeant promotions (made during this time re e to delays in exam development) Judge Peckham stated: du

> We note with dismay that, given a free choice, defendants have chosen to utilize what is perhaps the most discriminatory possible criteria in light of this court's finding of discrimination at the Q-2 level, from whose ranks such promotions are made. It therefore comes as no surprise that virtually none of the temporary promotions made to date are minorities. We also note that defendants' ability to promote for an indefinite period on the basis [of] seniority under the limited tenure rule dissipates any incentive to design a validated exam permitting permanent appointments in accordance with our 1973 order. We find the inference strong that the three-years delay in designing such an exam is not a mere coincidence.

Officers for Justice v. Civil Service Comm'n, 14 Empl. Prac. Dec. 7548 at 4718 (N.D.Cal. 1977).

In 1977, the United States sued the City for discriminatory employment practices, and the two suits were consolidated. Once the United States joined the case, negotiations began in earnest and in the Spring of 1978, the private and public plaintiffs and the City reached a tentative settlement. However, the Union opposed and settlement was not achieved. Judge Peckham then granted the United States' motion for partial summary judgment on a variety of matters including the 1971 sergeant's exam. *See Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801, 804 (N.D.Cal. 1979) *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983).

Civil Service Commission, 473 F.Supp. 801, 809 (N.D.Cal. 1979) *aff'd*, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983) ("The plaintiffs have, during the course of this litigation introduced substantial evidence of intentional discrimination by the defendants."); *Id.* at 804.

[6] In 1977, Judge Peckham also enjoined use of the assistant inspector exam because of adverse impact, *Officers for Justice v. Civil Service Comm'n*, 14 Empl. Prac. Dec. 7549 (N.D.Cal. 1977).

B. The Consent Decree

Trial on all remaining issues in dispute commenced in November of 1978. After two weeks of trial, proceedings were suspended to allow for further negotiations, and the parties reached agreement on what is now the Consent Decree underlying this case. Judge Peckham held a fairness hearing on March 5, 1979, and the Decree was approved by the court. *Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801 (N.D.Cal. 1979) aff'd, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). The Union is a signatory to the decree, and does not contest its validity.

The Consent Decree calls for specific, definable and good faith efforts on the part of the City to achieve certain goals for the employment of women and minorities within specific periods of time. *Officers for Justice* (D.Ct.) at 19a; *Officers for Justice* (Cir.) at 3a. Specifically, the Decree provides a long-term goal of 45 percent minority representation in the Department. Further, it calls for the promotion of women and minorities in proportion to their representation in the qualified applicant pool. *Officers for Justice* (D.Ct.) at 20a.

The Decree also prohibits the City from using any examination which has a disproportionately adverse impact against minorities or women, unless the examination is validated pursuant to the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. § 1607 et seq. (hereafter "Uniform Guidelines")). *See Officers for Justice* (D.Ct.) at 19a; Consent Decree para. 4 (Petitioner's App. at 68a). As such, the Decree incorporates the standards under the Uniform Guidelines for evaluating promotional examinations which have an adverse impact on minorities. *Officers for Justice* (D.Ct.) at 29a.

Further, the Decree prohibits the City from "unlawfully discriminating in any manner on the basis of sex, race, or national origin." *Id.* at 20a. "Unlawful discrimination" is defined by the parameters of Title VII and the Constitution and does not create an additional barrier to the use of otherwise lawful, voluntary affirmative action plans. *Id.* at 34a; *Officers for Justice* (Cir.) at 12a.

C. Post-Consent Decree History

In 1981, just two years after entering into the Decree, the City was found to have failed to make a good faith effort under the Decree in recruitment and temporary promotions. Order (Dec. 1981). Failure at the recruitment and temporary promotion levels directly affects the permanent promotion of minorities. For example, Judge Peckham noted, "[t]hose who gain experience as [temporary] sergeants may possess a substantial advantage in taking examinations for permanent positions . . . ." *Officers for Justice*, 14 Empl. Prac. Dec. 7548 at 4718.

Then, in 1983 examinations for these positions were administered for the first time under the Decree; again, both exams produced severe adverse impact against minorities. *San Francisco Police Officers Association v. City and County of San Francisco*, 812 F.2d 1125, 1126 (9th Cir. 1987). The Police Commission employed a reweighting device in an attempt to cure the adverse impact. This approach was ultimately held to be illegal by the Ninth Circuit. *Id.*[7]

Three more years passed without the offering of sergeant or assistant inspector exams. This delay triggered the district court, in 1986, to enter a supplemental order designed to alleviate the delay and the adverse impact which had plagued these exams. However, the Supplemental Order failed to produce either result. The deadline of December, 1986 for new sergeant and assistant inspector exams came and went. And, when these exams were finally administered in December of 1989[8] (three years late and

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[7] The district court found that the banding proposal at issue here is factually distinct from the reweighting scheme. *Officers for Justice* (D.Ct.) at 40a-42a.

[8] When, by August, 1989, still no sergeant or assistant inspector exam had been offered, the Court entered an order modifying the 1986 Order, requiring the City to offer sergeant and assistant inspector exams by December 1989. Order, 3 (Aug. 1989).

six years after the last sergeant and assistant inspector exams) the adverse impact was severe.[9]

II. THE CITY PROPOSAL

In response to the disparate impact of the 1989 exams, the City proposed to utilize a device known as "banding". "Banding is premised on the belief that minor differences in test scores do not reliably predict differences in job performance." *Officers for Justice* (Cir.) at 5a. *See Officers for Justice* (D.Ct.) at 24a. As such, through the use of "well-worn statistical principles which reflect the reliability of the examinations[,]"(*Officers for Justice* (D.Ct.) at 24a) a range of scores is articulated which an employer may reasonably treat as equivalent.

For the particular exams at issue in this case, the band width, on a 100 point scale, has been calculated to be approximately 4.00 points for the assistant inspector examination and 5.48 points for the sergeant examination. *Id.* Once the band width is properly calculated, the employer is free to select any candidate from within the band. However, "no candidate [is] denied a promotion in favor of another whose score is statistically significantly lower than his or hers." *Officers for Justice* (Cir.) at 5a.

Under the banding proposal ultimately approved in this case, selection from within the band is based on four criteria: professional conduct, including good conduct, the absence of disciplinary actions, and the absence of sustained citizen complaints; job-related performance and achievement; job-related education,

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[9] The City's failure in the area of promotions is not limited to its failure to develop exams free of adverse impact. The inordinant delay in offering exams violated the City's obligation to appoint sergeants and assistant inspectors on an annual basis. Consent Decree, paras. 10(a)(3) & (b)(2)(Petitioner's App. at 73a). Further, as a result of this delay, the City has never achieved the orderly promotions or long range planning envisioned by the Decree; nor has it developed or provided the in-service training program for sergeants and assistant inspectors or the middle management training curriculum required by the 1981 Order. The failure to develop these programs goes a long way toward explaining the City's inability to achieve an exam free of adverse impact.

training, experience and career development; and the Department's affirmative action goals. *Officers for Justice* (D.Ct.) at 46a. Under the approved procedure, all candidates whose scores fall within the band are considered on the basis of these criteria. The criteria are applied by a three-person panel consisting of the Department's affirmative action officer and two police officers holding a permanent rank of lieutenant or higher. *Id.* at 45a.

Under the approved plan, out of a pool of 747 candidates, the City proposed promoting 100 sergeants in rank order and creating a single band from which fifteen additional sergeant appointments would be made. *Id.* at 28a. Sixty assistant inspectors would also be promoted in rank order. *Id.* No further assistant inspector appointments were proposed. However, should the need arise, the City proposed to use banding to make those appointments. *Id.*

III. PROCEDRUAL HISTORY OF THE INSTANT DISPUTE

This dispute originally came before the district court at the request of the City. *Officers for Justice* (D.Ct.) at 15a. Desirous of implementing banding to mitigate the adverse impact of its most recent sergeant and assistant inspector exams, it foresaw opposition from the Union. Thus, the City sought declaratory relief prior to proceeding. *Id.* at 16a.

The matter was set for trial and five experts testified for two-and-a-half days regarding the statistical validity of the City's proposal. *Id.* at 24a. Pre-trial and post-trial briefing, as well as closing arguments were presented by the parties.

On June 6, 1991, the court struck down the City's initial proposal, which proposed to use race as the sole criterion for selection from within the band. Judge Peckham, however, recognized that banding as a concept was acceptable, and that a modified proposal would be reconsidered. *Id.* at 27a.

On June 28, the four-criteria selection method described above was submitted and briefed by the parties. The court also heard argument. On August 21, 1991, in a lengthy opinion, well-grounded in the factual record, Judge Peckham approved the modified proposal and the Union appealed.

Subsequent to the district court ruling, the Civil Rights Act of 1991[10] was enacted and on that basis the Union sought a stay pending appeal. The Union's arguments regarding the Act were briefed and argued in the district court, and upon denial of the stay, again briefed in the court of appeals. The stay was then denied by the Ninth Circuit.

The Union's banding appeal was argued in July, 1992 and a unanimous panel headed by Chief Judge Wallace upheld the City's modified proposal in November of 1992.

REASONS TO DENY CERTIORARI

I. INTRODUCTION

In upholding the City's banding proposal, Chief Judge Wallace stated:

> [W]e find that the efforts exerted in this process culminated in a unique and innovative program which succeeds in addressing past harms to minorities while minimizing future harmful effects on nonminority candidates. The successful efforts of all parties and the district court in reaching this resolution are to be lauded.

Officers for Justice (Cir.) at 14a. The Ninth Circuit recognized precisely that which the Union is attempting to obscure—that the proposal at issue represents a voluntary effort under which a local government fashioned a measure designed to mitigate the adverse impact of a particular set of exams, redress the effects of past discrimination, and further compliance with its consent decree obligations.

In challenging the results of this voluntary effort, the Union asserts that the Ninth Circuit has somehow coerced the City into adopting this measure. However, nothing could be further from the truth; the City voluntarily proposed, designed and defended the measure under review.

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[10] Pub. L. No. 102-166, 105 Stat 1071 (1991).

Ironically, it is the Union's analysis which would remove all discretion from an employer's hiring decisions—not the Ninth Circuit's ruling. The Ninth Circuit has merely ratified a city's voluntary affirmative action plan. However, under the Union's analysis, employers must be slaves to psychometricians and rank-order selection. According to the Union, unless an employer proves an exam invalid, it may not deviate in any way from rank-order selection. In other words, subsequent to administration of an examination process under which all candidates are treated equally regardless of race, an employer is prohibited from taking into consideration such factors as an employee's disciplinary record, educational background, or affirmative action as it pertains to the needs of the agency. This stark view of an employer as lacking all discretion in personnel decisions is without any legal support.

II. THE REASONS PRESENTED BY PETITIONER FOR GRANTING CERTIORARI ARE UNRELATED TO THE ISSUES CENTRAL TO DISPOSITION OF THIS CASE

As an initial matter, it should be noted that the Union's arguments tend to emphasize issues irrelevant to disposition of this case. Thus, a brief comment is called for to alert this Court to what this case is *not* about.

First, this case is not about what the City can be required to do. As noted above, at issue here is a voluntary affirmative action measure proposed, designed and defended by the City.

Second, this case is not about the selection device utilized by the City in 1983 referred to as "reweighting". Reweighting and banding are two factually distinct selection methods which were applied to two different sets of exams at two different times in history. Their many differences were briefed in the district and appellate courts, and as a factual matter the district court held that the two approaches are distinct (*Officers for Justice* (D.Ct.) at 40a-42a) and the Ninth Circuit affirmed. *Officers for Justice* (Cir.) at 14a.

Third, this case is not about what an employer may or may not do with an exam that has been proven to be valid. Plaintiffs deliberately put off a validity challenge in hopes that the City

would develop an alternative selection method—which it did. However, plaintiffs did not waive their right to challenge the validity of the exams, and their validity has never been proven.

Fourth, this case is not about the retroactivity of the 1991 Civil Rights Act. The Ninth Circuit did not even reach the issue stating: "It is unnecessary to reach th[e] [retroactivity] issue, however, because the Union's argument on the merits is incorrect." *Id.* at 8a.

Fifth, this case is not about Title VII. As Judge Wallace noted, "[t]he Union does not challenge the propriety of the affirmative action program under traditional Title VII analysis." *Id.* at 7a. Rather, The Union's sole Title VII challenge rests on its interpretation of the 1991 Civil Rights Act. *Id.*

Sixth, this case is not about the equal protection clause. The Union's sole equal protection argument rests exclusively on its interpretation of the underlying Consent Decree and not the Constitution at all.

III. NONE OF THE UNION'S REASONS FOR GRANTING CERTIORARI TURN ON ISSUES OF LAW

The Union bases its petition for certiorari on five grounds—every one of which asks this Court to overturn well-grounded factual findings or reverse the district court's interpretation of its own consent decree. Thus, none of the Union's arguments turn principally on issues of law.

A. The Union's Argument Regarding the Uniform Guidelines of Employee Selection Turns on Questions of Fact Not Law

The Union's argument regarding the Uniform Guidelines of Employee Selection relies on this Court reversing two findings of fact—not law.

First, the point of the Union's argument is to challenge the underlying factual conclusion that the City's proposal is substantially equally valid to rank-order selection. If the Court does not reverse this conclusion of fact, the Union's argument fails.

On the question of substantial equivalence Judge Wallace concluded:

> The district court, after hearing extensive expert testimony, decided that the City's computation of the band was appropriate .... The district court heard evidence that the test scores themselves are imprecise measurements of future job performance and that by banding the scores and considering secondary criteria in making promotion decisions, the City may increase the probability that the most qualified candidates will be promoted. The district court did not clearly err in finding that banding, as proposed by the City is more valid, or at least "substantially equally valid" to rank order promotions.

Officers for Justice (Cir.) at 13a.

Second, the Union attempts to make its case by assuming without proving that the City's proposal is an "*ad hoc*" measure. In framing the issue for this Court, the Union suggests that the Ninth Circuit found the City proposal to be *ad hoc*, but nonetheless required its use under the Uniform Guidelines. However, this is not the case: both lower courts concluded—as a matter of fact—that the City's proposal is not an *ad hoc* measure.

Judge Peckham made numerous factual findings regarding the City's proposal which run counter to the Union's depiction. For example, he concluded:

> —[T]he instant plan establishes no quotas. The plan "merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants."

Officers for Justice (D.Ct.) at 38a (citations omitted).

> —The proposal provides for consideration of race only insofar as the merit principle can be preserved ....

Id. at 39a.

> —Before the examinations were given ... [c]andidates were informed that banding of scores was possible.

Id. at 41a.

> —[The plan] does not require the hiring of any person not qualified for the job. . . . Thus, the City may waive its affirmative action objectives if no minorities fall within the highest band.

Id. at 44a.

In affirming, Judge Wallace described the City plan as "a facially neutral way to interpret actual scores and reduce adverse impacts on minority candidates while preserving merit as the primary criterion for selection." *Officers for Justice* (Cir.) at 14a.

Thus, the Union's argument, at center, does not address the meaning of the Uniform Guidelines, but underlying factual conclusions regarding the nature of the City's proposal. However, despite the clear factual findings of the courts below, the Union merely assumes that the City's proposal is *ad hoc* and offers no basis for concluding that the district and appellate courts' conclusion otherwise was clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (factual findings reviewed under clearly erroneous standard). Yet, if the Court is not inclined to reverse the district and appellate courts' factual findings as clearly erroneous, then the rest of the Union's argument on this score is of no consequence.

B. The Union's Sole Challenge Under the 1991 Civil Rights Act Rests on an Untimely, Factual Challenge Regarding the Nature of the City's Proposal—Not the Meaning of the Act

First, the Union's attempt to suggest that the City's proposal violates section 106 of the Act is not timely. As Judge Wallace noted, the Union did not raise or discuss this issue until its appellate reply brief, and therefore the issue has been waived.[11] *Officers for Justice* (Cir.) at 9a.

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[11] It is also worth noting that until raising this issue in its reply brief, the Union had repeatedly conceded in the proceedings surrounding its motion for stay that the Section 106 prohibition against race norming did not apply to banding, in that banding is not a score manipulation.

Second, the Union's challenge is fundamentally factual. It argues that review should be granted because the "Ninth Circuit has construed the Civil Rights Act of 1991 in a manner that thwarts the clearly declared congressional purpose of prohibiting the manipulation of civil service examination results as a means for achieving racial quotas in hiring and promotion." Petition for Writ of Certiorari, 24 (undated). Whether or not that is the clearly declared congressional purpose is irrelevant if the particular plan under review does not manipulate scores or involve racial quotas. On these factual matters the district court was clear: it made specific factual findings, grounded in the record, that banding does *not* involve score manipulation and does not constitute a racial quota. For example, Judge Peckham stated:

> Banding will not alter or manipulate the scores of candidates; nor will it allow the selection of candidates whose scores are statistically, reliably lower over other candidates.

Officers for Justice (D.Ct.) at 40a. *See id.* at 42a (same). Further:

> [the plan] is not a quota and does not require the hiring of any person not qualified for the job.

Id. at 44a. *See id.* at 38a (same).

The Union assumes without proving the underlying factual basis for its argument. No where does it argue—let alone establish—that Judge Peckham's factual findings were clearly erroneous.

C. The Question of Retroactivity of the 1991 Civil Rights Act is Unnecessary to Disposition of this Case, and this Case is Unnecessary for the Illumination of Retroactivity Principles

The Union's argument regarding the retroactivity of the 1991 Civil Rights Act is not appropriate for review since, as noted above, resolution of this question was unnecessary to disposition of this case and was therefore not even reached by the courts below. In other words, there is no reason for this Court to reach the question of retroactivity unless it is prepared to apply the Union's substantive interpretation of the Act. As noted above, the Union's substantive argument regarding the Act is fact-based,

untimely, inconsistent with prior positions it has taken on the meaning of the Act, and without a shred of legal support.

The retroactivity issue is tangential to the main issues of dispute and is being used by the Union in an attempt to inflate the importance of this case. In fact, as the Union's own presentation of the issue demonstrates, its retroactivity argument rests on the idiosyncratic chronology of this particular case. The Union hangs its entire argument on the fact that the Civil Rights Act was enacted during the small window of time between the district court's ruling and the City's carrying out that ruling. No broad principles would be clarified by scrutinizing the facts of this case. Moreover, the Court has already identified more illustrative cases for evaluating the retroactivity issue. *See Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted sub nom. Rivers v. Roadway Express, Inc.*, 61 U.S.L.W. 3437 (U.S. Feb. 22, 1993) (No. 92-938); Landgraf v. USI, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3371 (US Feb. 22, 1993 (No. 92-757). Thus, this case has nothing to offer the retroactivity debate except added factual details.

D. Accepting the Union's Equal Protection Argument Requires Reversing the District Court's Interpretation of its Own Consent Decree

The rest of the Union's arguments ask this Court to reject the district court's interpretation of its own consent decree. In fact, the Union's sole equal protection challenge rests on its interpretation of the Decree.

First, without regard to the merits of the Union's interpretation of the Decree, any decision of this Court based on the meaning of this particular consent decree would necessarily rest on narrow grounds and would not illuminate any broad questions in employment discrimination law.

Second, unless this Court is inclined to reject the district court's interpretation of its own Decree, the Union's equal protection argument is unavailing.

The district court judge who has interpreted the Decree in this instance, Robert F. Peckham, is the same judge who presided

over the five years of litigation leading up to the Decree, entered the Decree in 1979 and oversaw its enforcement until his recent death. No one knew this Decree like Judge Peckham. Moreover, it is generally recognized that while consent decree interpretation receives *de novo* review, a court's interpretation of its own decree should be given deference. *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 168 F.2d 885, 893 (9th Cir. 1982); *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981).

Turning to the district court's interpretation, it squarely rejected the Union's contention that the Consent Decree erected a barrier to implementing otherwise lawful affirmative action plans. Judge Peckham concluded:

> the banding proposal is consistent with the stated goals of the decree, since it will increase the potential minority representation in the police department. One of the long range goals of the Consent Decree is to eradicate the present effects of past hiring and promotion practices with regard to minorities and women.

Officers for Justice (D.Ct.) at 29a. In rejecting the Union's argument he stated:

> In effect, the POA argues that the consent decree prohibits the City from taking affirmative action. Because intervenor's argument 'would require us to disregard the underlying purpose of the City's legitimate affirmative action plan, . . . we reject it.' *Higgins*, 823 F.2d at 353.

Id. at 34a.

Judge Wallace concurred:

> The Union contends that the banding proposal violates the consent decree because it unlawfully discriminates against nonminority candidates on the basis of race. Implicit in this contention is the claim that the Consent Decree prohibits the City from implementing a legitimate affirmative action plan.

Officers for Justice (Cir.) at 12a. The Ninth Circuit rejected this interpretation. *Id.* Further, Judge Wallace specifically rejected the

Union's interpretation of the Decree which formed the basis of its equal protection argument. *Id.* at 10a

CONCLUSION

For the foregoing reasons, the Union's Petition for a Writ of Certiorari should be denied.

Dated: March 5, 1993

Respectfully submitted,

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